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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 705

ROBERT DAVID KERCHEVAL, OTHERWISE CALLED "BOB" KERCHEVAL, OTHERWISE CALLED "DAVE" KERCHEVAL, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 26, 1926

CERTIORARI GRANTED NOVEMBER 29, 1926

(32,272)

(32,272)

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INDEX

	Original	Print
Proceedings in the United States circuit court of appeals, eighth circuit	*a*	1
Caption (omitted in printing)	*a*	
Record from district court of the United States, western Arkansas	*b*	1
Citation and service (omitted in printing)	*b*	
Writ of error	*c*	1
Return to writ of error (omitted in printing)	*c*	
Indictment	1	2
Demurrer (omitted in printing)	20	
Order reciting withdrawal of plea of not guilty, etc.	21	25
Minute entries of trial (omitted in printing)	22	
Verdict (" " ")	23	
Order passing cause (" " ")	23	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 21, 1926

	Original	Print
Motion in arrest of judgment and order overruling same (omitted in printing)	24	
Judgment and sentence	25	26
Petition for writ of error (omitted in printing)	26	
Assignments of error Nos. 4 and 17	27	28
Order allowing writ of error (omitted in printing)	44	
Bond on writ of error (omitted in printing)	45	
Bill of exceptions	46	29
Caption	46	29
Testimony of M. E. Wilson and Exhibit No. 1 thereto (omitted in printing)	47	
Frank Glenn and Exhibits Nos. 2-9 thereto (omitted in printing)	55	
J. W. Swanson and Exhibits Nos. 10-14 thereto (omitted in printing)	91	
C. E. Martin and Exhibits Nos. 15-19 thereto (omitted in printing)	105	
Charles Bellina and Exhibits Nos. 20, 20a, and 22 thereto (omitted in printing)	122	
Wm. Dix Kenney and Exhibits Nos. 24-28 and Defendant's Exhibit No. 1 thereto (omitted in printing)	132	
M. D. Schultz and Exhibits Nos. 29-33 thereto (omitted in printing)	154	
A. C. Hiberman and Exhibits Nos. 36 and 37 thereto (omitted in printing)	162	
G. E. Bowers (omitted in printing)	168	
John G. Powell (omitted in printing)	171	
Lawrence Wilson (omitted in printing)	176	
J. D. Reynolds (omitted in printing)	177	
R. A. Ward and Exhibit No. 40 thereto (omitted in printing)	179	
Ira Ross and Exhibits Nos. 41-43 thereto (omitted in printing)	185	
Colloquy between court and counsel	199	29
Exhibit No. 44 in Evidence—Plea of guilty	200	30
Colloquy between court and counsel	200	31
Defendant's requested instruction to jury	201	32
Testimony of J. D. Reynolds (omitted in printing)	201	
W. W. Brown and Exhibit No. 2 thereto (omitted in printing)	223	
O. T. Clark (omitted in printing)	237	
J. E. Ireson (omitted in printing)	241	
O. T. Clark (recalled) and Exhibits Nos. 3-7 thereto (omitted in printing)	243	

	Original	Print
Testimony of R. D. Kercheval and Exhibits 8 and 9 thereto (omitted in printing)	251	
Jack Conway and Exhibits 10-18 thereto (omitted in printing)	267	
F. M. Compton (omitted in printing)	291	
—— McCullough (omitted in printing)	294	
Mrs. S. D. Eddings (omitted in printing)	296	
J. F. Wright (omitted in printing)	298	
C. H. Cox (omitted in printing)	299	
Miss Theresa Hudsonrider (omitted in printing)	301	
Miss Edna Hudsonrider (omitted in printing)	302	
John Gilliland (omitted in printing)	303	
L. B. Snead (omitted in printing)	306	
J. D. Reynolds (recalled) and Exhibit 18 thereto (omitted in printing)	309	
L. E. Aven and Exhibit 19 thereto (omitted in printing)	315	
Tom Adams (omitted in printing)	323	
Fred Oliver (omitted in printing)	327	
R. D. Kercheval	330	32
Exhibits 19-28 (omitted in printing)	346	
Exhibit No. 29—Order withdrawing plea of not guilty	389	33
Exhibit No. 30—Telegram, R. D. K. to George E. Keith, February 20, 1924	392	37
Exhibit No. 1—Letter from Robert D. Kercheval to H. L. Arterberry, February 9, 1924	394	40
Exhibits in Evidence—Motion to set aside judgment	397	43
Response to motion to set aside judgment	402	50
Exhibits Nos. 3-9 (omitted in printing)	412	
Testimony of J. D. Reynolds (omitted in printing)	439	
Mrs. Minnie V. Kercheval (omitted in printing)	439	
S. S. Langley	441	57
Ira Ross	445	63
R. D. Kercheval (recalled)	448	67
Charge of court to jury	463	69
Defendant's requested instructions to jury (omitted in printing)	466	

	Original	Print
Order settling bill of exceptions (omitted in printing)	471	
Clerk's certificate (" " ")	472	
Appearances of counsel (" " ")	473	
Argument and submission (" " ")	475	
Opinion, Kenyon, J.	476	70
Judgment	485	79
Petition for rehearing (omitted in printing)	486	
Order denying petition for rehearing	504	79
Petition for stay (omitted in printing)	504	
Order staying mandate (" " ")	506	
Clerk's certificate (" " ")	507	
Order allowing certiorari	508	80
Stipulation as to parts of record to be printed	509	80

[fols. a-c]

IN UNITED STATES DISTRICT COURT, WESTERN ARKANSAS

WRIT OF ERROR—Filed April 27, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Arkansas, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the November Term, 1924, thereof, between The United States of America, Plaintiff, and Robert David Kercheval, defendant, a manifest error hath happened, to the great damage of the said Robert David Kercheval as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said records and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the 25th day of June, 1925, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States this 27th day of April, in the year of our Lord one thousand nine hundred and twenty-five.

Issued at office in the City of Texarkana, Arkansas, with the seal of the District Court of the United States for the Western District of Arkansas, and dated as aforesaid.

Wm. S. Wellshear, Clerk District Court United States Western District of Arkansas. (Seal of the District Court, U. S. A., Western District of Arkansas.)

Allowed by Frank A. Youmans, Judge.

[File endorsement omitted.]

[fol. 1] IN UNITED STATES DISTRICT COURT

No. 1901

THE UNITED STATES OF AMERICA

v.

ROBERT DAVID KERCHEVAL, Otherwise Called "Bob" Kercheval, Otherwise Called "Dave" Kercheval

INDICTMENT—Filed December 12, 1923

THE UNITED STATES OF AMERICA,
Western District of Arkansas,
Texarkana Division, ss:

At a regular term of the United States District Court for the Western District of Arkansas, begun and holden on the 12th day of November, A. D. 1923, within and for the Texarkana Division of the Western District of Arkansas, at Texarkana, Arkansas, the Grand Jurors for the United States, selected, tried, empaneled, sworn and charged to inquire into, and true presentment make of all offenses under the laws of the United States committed within said district, upon their oaths present in open court and charge:

That heretofore, and prior to the several acts of using the United States Mails hereinafter set forth, one Robert David Kercheval, otherwise called "Bob" Kercheval, otherwise called "Dave" Kercheval, hereinafter in this indict-

ment called defendant, had devised and intended to devise a scheme to obtain money and property by means of false and fraudulent pretenses, representations and promises from numerous and sundry persons, too numerous to mention herein, and including the public generally, and including those whom, by the means hereinafter described, were induced to give, send and pay their money and property to the said defendant for what is hereinafter styled: Shares or Mineral Deeds of the Poindexter Royalty Syndicate and Smackover Jack Pot Syndicate (all of said persons being hereinafter referred to as the person to be defrauded), the said scheme being in substance and effect as follows, to-wit:

That the said defendant would organize and promote two certain oil stock promotion companies and sell shares or mineral deeds thereof, and dominate and control said companies and trust estates regardless of the interest of [fol. 2] the shareholders, said companies being as follows, to-wit:

Poindexter Royalty Syndicate with an authorized capitalization of $300,000 divided into 10,000 units or mineral deed assignments of the par value of $30.00 each with "Dave" Kercheval as sole trustee; Smackover Jack Pot, with authorized capitalization of $5,000,000 divided into 100,000 units or assignments of interest of the par value of $50.00 each, with "Bob" Kercheval, as sole trustee;

Both of said syndicates and trust estates would and did have their principal offices and places of business at Camden, Ouachita County, Arkansas, and would be and were dominated and controlled by the said defendant, with the pretended purpose of selling and dealing in oil royalties and mineral deed assignments, and in the oil business in general, for profit, but in truth and in fact for the purpose of selling shares or assignments of interest in both of said syndicates, to-wit: Poindexter Royalty Syndicate and the Smackover Jack Pot, and to appropriate and convert to his own use and benefit, large sums of money and property which would be and were received in payment therefor.

It was further a part of the said scheme and to more effectually carry said scheme into effect, the said defendant, would organize a so-called and pretended brokerage company, to-wit: American Finance Corporation, and would

largely own, dominate and control said alleged and pretended brokerage company and would and did use the same as an organ and agency and as a mouthpiece in sending out market letters and stock quotations, quoting fictitious prices on said shares or mineral deeds in said two enterprises, and boosting the said two enterprises of the said defendant and which would and did further aid and assist the said defendant in furtherance of his said unlawful and fraudulent scheme.

It was further a part of said scheme that the said defendant would and did represent, advertise and pretend that he, the said defendant, would declare a 50% cash dividend which, would be paid at a future date, to all holders of shares or assignment of interest in said two syndicates, whereas in truth and in fact, as the said defendant, then and there well knew that there was no income from said syndicate, or either of them, from which said alleged and pretended cash dividend could be and would be paid, but in truth and in fact, as the Grand Jurors charge the facts to be, said alleged and pretended cash dividend was only promised and held forth as an inducement, allurement and bait for said persons to be defrauded to make other and further investments in said unlawful and fraudulent scheme and to pay over their money and property to the said defendant without receiving anything of adequate value in return therefor.

It was further a part of said scheme that the said de- [fol. 3] fendant should appropriate and convert to his own use and benefit in the form and under the guise of salary, drawing accounts, expenses and commissions, a part of the money and property which would be and was paid for the purchase price of said shares or assignments of interest in said syndicates, but the exact manner and means by which said defendant intended thus to convert and appropriate to his own use and benefit such part of said money and property and the exact amount thereof that said defendant intended to and did thus appropriate and convert, is to the Grand Jurors unknown.

It was further a part of said scheme that the said defendant would make false and fraudulent pretenses, representations and promises to said persons to be defrauded through and by means of divers printed circulars, newspaper adver-

tisements, letters and publications and directly and through agents, all of which said matter would be and was sent to said persons to be defrauded, for the purpose of inciting and inducing said persons to be defrauded to purchase said shares or mineral deeds in said syndicates and to pay over their money and property for same, under his own name, and to said Poindexter Royalty Syndicate, Smackover Jack Pot and American Finance Corporation, respectively, in order that he, the said defendant, might fraudulently appropriate and convert large portions thereof, to his own use and benefit.

And the said defendant planned and schemed, that for the purpose of so inciting and inducing said persons to be defrauded, to deliver to him, the said defendant, their money and property he, the said defendant, would make false and fraudulent pretenses, representations and promises, in substance and in effect as follows, to-wit:

(1) To the effect that it was not the same old story an organization here today and gone tomorrow; that Jack Pot was not in that class, but that it was an organization built on principle that would carry forward and grow to larger successes year after year; that said company was organized so that it could take advantage of changing conditions as they should come in the oil industry; when in truth and in fact as the said defendant then and there well knew that the said Jack Pot Syndicate was only a fly-by-night concern and that it was not an organization built on principle which would carry forward and grow to larger successes year after year and that it was not true that said company was so organized that it could take advantage of the changing conditions that should come in the oil industry;

(2) To the effect that said Jack Pot Company was not a haphazard organization, but that its lines reached out; that the said defendant went into oil fields anywhere and bought, that his said stockholders were not gambling their all on the outcome of the drilling of one well; that Jack Pot in-
[fol. 4] vestments would cover the field; that the said defendant needed capital to invest in cheap oil; that if said persons to be defrauded bought Jack Pot Shares they would

be in the big whack-up that would come from the said defendant's sales within the next 90 days to 6 months; when in truth and in fact as the said defendant then and there well knew that said Jack Pot was only a haphazard organization and was only a stock selling promotion scheme of the said defendant and that it was not true that said persons to be defrauded had or would have an opportunity to be in on the big whack-up or any kind of whack-up within 90 days to 6 months or at any other time, other than paying over their money and property to the said defendant, who would and did thus appropriate and convert the same to his own use and benefit;

(3) To the effect that Jack Pot shares were $50.00 each, par value, but that he, the said defendant, was making a special offering of four $50.00 shares for $50.00, eight $50.00 shares for $100.00 and sixteen $50.00 shares for $200.00, that the reason said offer was made was because the said defendant could buy production at a tremendous discount and that it was necessary to get quick money or the opportunity would be gone; when in truth and in fact as the said defendant then and there well knew that said alleged and pretended special offer of shares in said syndicate for less than par value was only made as a further inducement to said persons to be defrauded to pay over their money and property to said defendant who would and did thus appropriate and convert the same to his own use and benefit;

(4) To the effect that Jack Pot was a fair, square proposition and defendant could see no reason why every investor would not reap a big harvest; that defendant was in the position of the farmer who had the wheat but who needed the hands to harvest; that the defendant needed hands to help harvest the crop of oil dollars he was sure to make; when in truth and in fact as the said defendant then and there well knew that the said Jack Pot Company was not a fair, square, proposition and there was no reasonable prospect that said investor (being of the persons to be defrauded) would reap a big harvest or any kind of harvest of profits out of said company, and the pretended harvest of oil dollars was only a lure and a bait to further induce said persons to be defrauded to part with their money and

property by investing in the said unlawful and fraudulent scheme of said defendant;

(5) To the effect that big money interest could spread propaganda to hide behind; that the big companies did not want the oil promoter, because they detested competition; that for said persons to be defrauded to listen to reason and not be carried off their feet by the saintly air of the big oil companies making said persons to be defrauded [fol. 5] believe that all oil promoters were crooks; that those same big boys were once promoters, that if said persons to be defrauded wanted to put their dollars to work where they could earn something they should buy Jack Pot interest; when in truth and in fact as the said defendant then and there well knew that each and every of said pretenses, promises and representation made were false and untrue and made with the intent and purpose of further inducing and inciting said persons to be defrauded to make other and further unprofitable investments in said syndicate and to pay over their money and property to said defendant;

(6) To the effect that the Smackover Jack Pot ante was $10.00; that the sky was the limit and there was no rake-off; that for said persons to be defrauded to put their ante in the mail and they would be issued for each ten spot a $50.00 Smackover Jack Pot Certificate; when in truth and in fact as the said defendant then and there well knew that it was not true that there was no rake-off by the said defendant out of the money and property paid over to him by the said persons to be defrauded, but that large portions thereof was appropriated and converted to defendant's own use and benefit;

(7) To the effect that the Capital Syndicate, a brokerage company, of Denver, Colorado, had underwritten the issue of stock of the said defendant and that they, the said Capital Syndicate, would offer for public subscription Jack Pot Certificates at par $50.00 each, that said securities would now be traded in throughout the U. S. A. and Canada and would be nationally advertised; when in truth and in fact as the said defendant then and there well knew that it was not true that the Capital Syndicate of Denver, Colo-

rado, had underwritten the issue of stock of the said defendant, but that said syndicate had purchased a small block at greatly reduced prices, and that said Jack Pot stock had no reasonable prospect of being bought and sold on the market of the United States;

(8) To the effect that said persons to be defrauded may not have been lucky to be in on the 50% whack-up for April, 1923, but that they, the said persons to be defrauded, could secure a "hand" and come in for the big "divey" which defendants expected to make in May; when in truth and in fact as the said defendant then and there well knew that it was not true that the defendant had paid a 50% whack-up in April, but in truth and in fact a fake stock dividend of 50% was declared; that there were no earnings from the said syndicate to cause a stock dividend of 50% or any dividend whatsoever to be declared and that said so-called dividend was declared and issue as a "hurry-up" and "come on" proposition to further incite and induce said persons to be defrauded to pay over other and further [fol. 6] sums of money and property to the said defendant;

(9) To the effect that through the various investigations of the United States Government with reference to the operations of a great many of the small promoters in the oil industry and that tremendous publicity had been given to all that by the Metropolitan Newspapers and that it was a well known fact that the large oil operators have profited by said investigations, by reducing the price of oil; when in truth and in fact as the said defendant then and there well knew and intended that said statements and representations were false and untrue and made and uttered with the intent and purpose of further misleading and deceiving the persons to be defrauded, by inducing and inciting them to pay over other and further sums of money to said defendant;

(10) To the effect that prosecution was not spelled the same as persecution; that said defendant would not say which word the great U. S. A. was now using; that defendant was entitled to his own opinion, even though it might be dangerous to express it; that the war with Germany was over, but that other wars seemed to be on; when in

truth and in fact as the said defendant then and there well knew that said statements and representations made, both directly and by innuendo, that the Government of the United States was not treating the oil promoters fairly by reason of its investigation of them, were false and untrue and made for the purpose of attempting to cover up and conceal his, defendant's, own fraudulent scheme and operations and to further deceive and defraud the said persons to be defrauded;

(11) To the effect that the Smackover Jack Pot had made a deal and had made a clear profit of $13,000 and that the said company would pay to all its stockholders of record on April 10, 1923, a 50% dividend, and that it would be a good idea for said persons to be defrauded to shoot a few tens in Smackover Jack Pot; when in truth and in fact as the said defendant then and there well knew that it was not true that the Smackover Jack Pot made a clear profit of $13,000.00 on an alleged deal, or any other sum or amount, and that said promise of a dividend of 50% was only another of the means to further incite and induce the said persons to be defrauded to make other and further unprofitable investments in said syndicate and pay over their money and property for same to said defendant;

(12) To the effect that when said persons to be defrauded bought Poindexter Royalty Syndicate Mineral Deeds that they would become the permanent owners and were buying something that was worth every cent they were asked to pay for same; when in truth and in fact as the said defendant then and there well knew that it was not true that said interests in the Poindexter Royalty Syndicate were worth every cent asked for them, but in truth and in fact [fol. 7] said interest were practically worthless and of little or no value whatsoever to the purchasers of the same, being of the persons to be defrauded;

(13) To the effect that the "Jimmy" Cox well located in Section 30—less than one-half mile from the Poindexter Royalty holdings—was making considerable gas and some oil; that the best informed men in the field were of the opinion that the Cox well would be one of the "gusher" type

well in the Smackover field and that it would be a big boost to royalty in that section; that there was no question but what Poindexter Warranty Royalty Deeds were an exceptionally good investment and that said persons to be defrauded should purchase them to the limit of their ability; when in truth and in fact as the said defendant then and there well knew that the so-called "Jimmy" Cox well was not an oil well or a producer of oil in commercial quantities but that the same was what is commonly called a salt-water well, all of which the said defendant well knew at the time of making said statements;

And the Grand Jurors further say, present and find that each and every of the pretenses, representations and promises made and planned to be made by said defendant, were false and untrue and at all the times mentioned herein were known by the defendant to be false and untrue, and to be made by the said defendant with the purpose and intent of inducing the said persons to be defrauded, to pay to him, the said defendant, large sums of money and property for shares or mineral deed interests of the said companies and syndicates and which said shares or mineral deed interests in said syndicates were then and there of much less value than the persons to be defrauded were to pay for the same; all of which the said defendant then and there well knew;

And the said defendant so having devised and intending to devise the aforesaid scheme did on the 1st day of February, 1923, at Camden, Arkansas, in the Texarkana Division of the Western District of Arkansas, and within the jurisdiction of this court, for the purpose of executing said scheme and attempting so to do, wilfully, unlawfully, knowingly, fraudulently and feloniously place and cause to be placed in a postoffice of the United States, to-wit: the postoffice at Camden aforesaid, to be sent and delivered by the postoffice esablishment of the United States to the addressee thereof, a certain letter, enclosed in a postpaid envelope, and adressed to Frank Glenn, 3531 Van Buren St., Chicago, Ill., said letter being of the tenor following, to-wit:

Poindexter Royalty Syndicate, Camden, Arkansas

Feb. 2, 1923.

[fol. 8] Mr. Frank Glenn, Chicago, Ill.

Dear Sir: Several days ago we sent you a letter regarding Poindexter Warranty Mineral Deeds.

It may be that you did not receive this letter, or that you have misplaced it, or again it may be that you do not fully realize what we are offering you.

We own a 1/32 interest in the Royalty on 500 acres in the Famous Smackover Oil Field, and the lease on this 500 acres is owned by the Standard Oil Company of La., and this company is to begin drilling on this acreage in 120 days from November 24, 1922, and in fact they have already made their location for their first well, and will very probably be drilling much earlier than they are required to do by contract.

It is possible that you do not understand that every dollar of expense that it takes to drill these wells and every dollar of expense that is required to market the oil is paid by the Standard Oil Company and our Royalty holders get 1/32 of all the oil that is ever produced from this vast tract.

Now listen this Royalty has been divided into 1,000 parts and that is what we are offering you. For the sum of $100 we will issue you 4/1000 of this royalty. Your name will be placed on record and as Oil is Marketed by the Standard Oil Company, they send you a check each month for your interest.

Here is what we did. We bought this Royalty and a lot of things have happened since. A lot of oil wells are now in and the Standard Oil Company is going to drill on this acreage and we are offering you a part of what we bought. You are not gambling half as much as we did. We had to buy it all to get any and now we are allowing you to come in for a few dollars, and share the profits with us. Are we selling You at the same Price We Paid? No. Because it is worth far more now than it was then, But We Are Selling at a price that is going to make you a lot of money or we miss our guess and the Standard Oil Company also misses their guess and the best evidence that they are pretty sure to be right is the Millions they have made.

You may not know it, but it is a fact a lot of Big Dividends have already been paid down here and a lot more are going to be paid and it was only a few days ago that Pat Marr mailed out to almost 5,000 people 100% Cash Dividend. Well about 140 days ago he was writing to a lot of people telling them he wanted them to buy in with him. A Lot of These Folks said No. "Don't think we are suckers." Well listen—there were about 5,000 suckers who sent him money. Now he has just finished sending those 5,000 suckers 100% dividend in cash. Now who was the sucker? [fol. 9] The fellow who Bought or the fellow who did not? Just answer this question. Don't you think it will pay to be fair with yourself?

Now Pat Marr is not the only fellow who has made a lot of people happy out of Smackover Oil.

Bob Chew, Paul Vitek and Vidler Royalties, have also made their Sucker investors happy. Each of these three companies and many more have mailed to every Man, Woman and Child that had an interest with them 100% and more in Cash Dividend.

Those people are going to get a lot more Dividends and a lot of other companies down here are going to make a lot of people happy.

The Oil Business is Just Like Any Other Business. If you Hit—You Make Money. If You Miss. You Lose, The Only Difference Is—When You Hit In the Oil Business, You Hit Bigger than you hit in most any other. Royalties offer the safest side of the oil business.

When you buy a Royalty Mineral Deed, you become the permanent owner and you are buying something that is worth every cent we are asking you to pay.

Many wells in the Smackover Field are producing from 10,000 to 25,000 barrels of oil daily.

Twenty five thousand barrels of daily production on the lease on which Poindexter Royalty holds their interest would mean but one thing. One Hundred Percent Dividend Per month. Understand we don't guarantee you 100% but we do say this is possible. I am sure you will agree with me that for $100.00 you cannot go out and buy an oil, well, but when a Lot of folks put in a $100.00 then you have a pot of money and you can do things. When we purchased this Royalty we believed that there were at least 250 people that

would like to join us for $100.00 each, but we did not have time to write all you folks and find out, so we layed out the cash and now we are writing you and telling you what it is all about.

It is a fair square proposition and the first 250 people who send us $100.00 are going to be mighty glad they did.

The only way to make Money is to make it work for you and we are offering you this opportunity. Poindexter Warranty Mineral Deeds. Price—4 Deeds $100.00 or 1 Deed $30.00. What are you buying? You are buying 1/1000 of 1/32 Royalty interest in every Barrel Of Oil that may ever be produced from this entire 500 acres of land, down here in Arkansas in the great Smackover Oil Field and the Standard Oil Company are going to do the drilling and they are going to spend all the money and when they get the oil the [fol. 10] Standard Oil Company will mail you your check each and every month, just as long as you continue to hold your interest.

Now if you want to make a Lot of Money by investing $100.00 just sign the enclosed application blank and shoot it along with your check pinned to it and if we still have the Warranty Deeds, we will keep your check and send you the Warranty Deeds. If they are all gone we will return your check.

It might be a good thing to wire your application and let check follow.

Here is hoping we will make a lot of money and that you won't misplace this letter and keep us waiting for your check until we have sold all the Deeds.

Yours for the 100% dividends, Poindexter Royalty Syndicate, by Dave Kercheval.

P. S.—Say you don't know who we are so it might be better for you to just send your check to the Ouachita Valley Bank here and tell them when we deliver so many deeds to them that they are to give us your check.

Make check payable to Poindexter Royalty Syndicate.

That at the time of the placing and the causing to be placed said letter in the postoffice of the United States as aforesaid, the defendant then and there well knew that said letter was for the purpose of executing said scheme; con-

trary to the form of statutes in such cases made and provided and against the peace and dignity of the United States of America.

Second Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that said defendant, on May 1, 1923, at Camden aforesaid, in said division and district aforesaid, so having devised the scheme for obtaining money and property by means of false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are incorporated by reference thereto, in this count, as fully as if they were here repeated, for the purpose of executing said scheme, and attempting so to do, unlawfully, wilfully, knowingly and feloniously, did place and cause to be placed a certain letter in the postoffice of the United States at Camden aforesaid, there to be sent and delivered by the postoffice establishment of the United States to another of said persons to be defrauded, that is to say, a letter enclosed in a postpaid envelope and addressed to Mr. Wm. D. O'Connell, 705 Charleston Street, Mobile, Alabama, said letter being of the tenor following, to-wit:

[fol. 11] American Finance Corporation, Brown Building, Camden, Arkansas

Leases, Royalties, Production, Deeds, Bonds, Stocks

April 30, 1923.

Mr. Wm. D. O'Connell, 705 Charleston Street, Mobile, Alabama.

Dear Mr. O'Connell: We have your favor of the 28th inst., in reply to ours of the 25th inst.

Our Mr. Kercheval, President of the Company, is in Kansas City and Denver on business and just as soon as he returns to sign the voucher, we will forward you your money as per your letter.

We wish to call your attention to Smackover Jack Pot which is selling at $10.00 for a fully paid up $50.00 interest. All stockholders on record of April 10th will receive

a 50% cash dividend, and they expect to pay another big dividend in May.

We are advised by the Trustee that he expects to advance the price of these Certificates May 16th, and in our opinion if you want to make a buy that will pay you real money you cannot make a mistake in taking a block of these Certificates.

For your convenience we herewith attach application blank which you can send direct to us, and we will be pleased to execute your order for whatever amount of these Certificates you desire.

Everything points now that Smackover Jack Pot will be able to pay a good many dividends before the year has closed.

Awaiting your advice, we are,

Yours very truly, American Finance Corp. C. E. Martin, Vice-Pres.

M:PD.

that at the time of the placing and the causing to be placed said letter in the postoffice of the United States as aforesaid, the defendant then and there well knew that said letter was for the purpose of executing said scheme: Contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

Third Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that said defendant on June 16, [fol. 12] 1923, at Camden aforesaid, in said division and district aforesaid, so having devised the scheme for obtaining money and property by means of false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are incorporated by reference thereto, in this count, as fully as if they were here repeated, for the purpose of executing said scheme, and attempting so to do, unlawfully, wilfully, knowingly and feloniously, did place and cause to be placed a certain postpaid envelope in the postoffice of the United States at Camden aforesaid, and which said envelope had enclosed therein three circular

letters, together with application blank and self addressed envelope and which said circular letters were to be sent and delivered by the postoffice establishment of the United States to another of said persons to be defrauded, that is to say, said circular letters being enclosed in an envelope and addressed to Frank Glenn, 3609 S. Pakley Av., Chicago, Ill., said letter being of the tenor following, to-wit:

Smackover Jack Pot, Camden, Arkansas, Where They All Meet on Equal Terms

Smackover Jack's Table

$ $ $
$ Big Pot $
$ $ $

No Kitty in the Middle

Have a Seat

Dear Sir: It is not the same old story. An organization here today and gone tomorrow. Most of us have learned such stories at the expense of hard earned "Dollars."

Jack Pot is not in that class, but is an organization built on a principal that will carry forward and grow to larger successes year after year.

This company is so organized that it can take advantage of changing conditions as they come in the oil industry.

Today we find Crude Oil a drug on the Market selling far below its real value. Many small companies are being forced to sacrifice to the Big Boys who have the money, by buying at their own price, They make Money earn money.

Jack Pot is preparing to enrich its stockholders by following the same plan. Buy production today for a song. Hold it for the next ninety days to six months, then sell. What does it mean? Production we buy today for $10,000.00 will no doubt sell in the early fall for $30,000.00 to $50,000. From this Sure profit, our stockholders will no doubt receive 300 to 500 per cent. This is the safe way to play the oil game.

[fol. 13] This is not a haphazard organization, but our lines reach out. We go into Oil fields anywhere and buy.

You as a stockholder are not gambling your All on the outcome of the Drilling of one Well.

Jack Pot investments will cover the field. Few have ever seen a time when a Dollar will go as far in the oil game, as it will now. We need Capital to invest in Cheap Oil. If you buy Jack Pot Shares, you are going to be in on the big Whack up that will come from our sales in the next ninety days to six months.

Here is an investment opportunity that should appeal to men and women of reason. You cannot possibly go single handed and alone with a $100.00 and properly invest it in the Oil Game, but you and 999 more people can form a Pot of $100.00 each and then with The $100,000.00 get into the game.

We invite you to come in the Oil game with $100.00 more or less. We can buy valuable production by paying part cash and balance monthly. You can buy in the Jack Pot on the same plan.

Smackover Jack Pot. Shares par value $50.00 each. Special Offering. Four $50.00 Shares for $50.00. Eight $50.00 Shares for $100.00. Sixteen $50.00 Shares for $200. Why do we make this special offer? Because we can buy production today for a tremendous discount and it is necessary that we have the money quick or else the opportunity will be gone.

No subscription accepted for less than four shares, or more than sixteen at the discount price. For your convenience, we have arranged a plan whereby you can mail 20 per cent with your order and balance payable in four equal monthly payments. Should you buy four shares, send $10.00 with order. Should you buy sixteen send $40.00 with order. On receipt of initial payment your stock will be made out in your name and placed in your file and you will be credited with the dividends on full amount of shares purchased.

The above plan is offered you because we can arrange our purchases on same lines.

Here is a fair square proposition and we can see no reason why every investor will not reap a big harvest.

We are in the position of the farmer who has the wheat but needs the hands to harvest.

We invite you to help us harvest the crop of oil dollars that is ripe and ready for the reaper. Will you do your part?

Use the application blank, mark your decision, place in addressed envelope. Act today.

[fol. 14] Assuring you we are out to make big returns for our stockholders, and that you will be given a square deal, we are,

Sincerely, Smackover Jack Pot. Bob Kercheval, Dealer.

BK-CR.

Help. Read Facts Help.

Let's Take the Mask Off and See What it Hides

Within the past few months a number of Oil Operators have been indicted for using the mails fraudulently.

You may be a stockholder in some of these Companies. Frankly, has your stock increased in value since these men have been indicted? No, it has not, but instead, most of these Companies' Stocks have gone a great deal lower.

Of course, the many operators who have been indicted are up against it to raise capital to go forward with their operating campaigns. As a Stockholder you have been hurt. Has anybody or Company found themselves in a better position since these indictments? Yes, Big Companies who had surplus money have been able to buy leases and production at their own price. Competition from the small operator has been eliminated.

Your opportunity to make back some of your losses, or maybe all, is presented to you now.

Smackover Jack Pot asks you to send in cash so that we may go out and buy a part of this cheap production.

All we have to do is buy now, hold on until the Big Companies get ready to put the price of oil up again. Then we will sell for a profit. You will make money by investing now.

The Big Companies don't want you to invest your money with the small operator for they don't want competition. They don't want the boys who risk their all in this game. They don't want to pay big prices for leases. They want you to think the Promoter is a crook. They want you to

put our money in the Savings Bank. They can go to the bank and borrow your money and use it to put the little fellow out of the game.

Don't you think it is about time for the man of small means to have some say?

If you join Smackover Pot today you will be helping yourself and at the same time making it possible for the small operator to stay in the game.

We are not quitters and we need your help now. That [fol. 15] is why we make you the special offer as contained in enclosed circular.

Will you help?

Yours truly, Smackover Jack Pot, by Bob Kercheval, Dealer.

Read—Think—Act

Whenever Big Money interests can spread propaganda to hide behind, it makes their task of crushing the Small Man Easy

We have Railroads, Automobiles, Flying Machines, Electric Street Railways, Steamship lines, and many other important industries. Who made these things possible? The despised promoter.

The big Oil Companies don't want the Oil Promoter—why? Because they detest competition. Do you ever lose money when you buy the Big Boy's Stock on Wall Street? Yes. Why not put up a yell and have them indicted?

Now listen to reason, don't be carried off your feet by the Saintly air of the Big Oil Companies. Don't let them make you believe that all Oil Promoters are Crooks. These same Big Boys were once Promoters.

What are you going to do? Let the big interests monopolize the Oil Industry? That's what they would have you do. Well, let me tell you something; if you don't help the little fellow, it won't be long until Mr. Big Oil Man will pay what he pleases for Leases and Production, and he will charge you what he pleases for the gas you use in the flivver. Between Mr. Flivver Maker, and Mr. Big Oil Boss, they have sewed up the money of this country already.

When you go in your bank they take your money and if you want to invest it they attempt to tell you what's

good for you to buy. There never will be a better time to make money in the Oil Game than now.

I cannot buy production unless I have money, and all I can do is appeal to the American Public's good common sense. If you will send me money I am going to invest it in the Oil Game down here and you are going to get a square deal and if I don't make a bunch for us all I will miss my guess.

If you want to put your dollars to work where they can earn something for you—buy Jack Pot today.

Yours respectfully, Smackover Jack Pot, by Bob Kercheval, Dealer.

That at the time of the placing and causing to be placed said circular letters in the post office of the United States as aforesaid, the defendant then and there well knew that [fol. 16] said letters were for the purpose of executing said scheme; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

Fourth Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that said defendant, on April 21, 1923, at Camden aforesaid, in said division and district aforesaid, so having devised the scheme for obtaining money and property by means of false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are incorporated by reference thereto, in this count, as fully as if they were here repeated, for the purpose of executing said scheme, and attempting so to do, unlawfully, wilfully, knowingly and feloniously, did place and cause to be placed a certain letter in the post office of the United States at Camden aforesaid, together with a certificate of interest of the Jack Pot Syndicate and also application blanks for further subscriptions in said syndicate, the same being enclosed together with said letter, there to be sent and delivered by the post office establishment of the United States to another of said persons to be defrauded, that is to say, said letter together with enclosures

being enclosed in a postpaid envelope and addressed to Mr. Charles Billina, 1503 Poplar Street, Denver, Colorado, said letter being of the tenor following, to-wit:

50 for 10. Have a Seat

Smackover Jack Pot

April 20, 1923.

Mr. Charles Billina, 1503 Poplar Street, Denver, Colorado.

DEAR MR. BILLINA: Enclosed find certificate for one $50.00 interest in Smackover Jack Pot as covered by your Post Office Money Order. You got in under the wire. This means that for every Ten Spot invested by you, there will be a Five Spot handed back out of the first whack up.

The dealer has another proposition on, which is practically consummated and if it goes through we will be able to make another whack up some time in May, and we anticipate that it will be at least a 50% dividend. This will hand back to all players who are in at that time their original investment and they will be sitting in the game [fol. 17] with a Royal Flush. So use the wire immediately if you want the dividend check to be a big one.

Yours for big play, Smackover Jack Pot. Bob Kercheval, Dealer.

BK:PD.

That at the time of the placing and causing to be placed said letter, with enclosures, in the post office of the United States as aforesaid, the defendant then and there well knew that said letter, and enclosures, were for the purpose of executing said scheme. Contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

Fifth Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that said defendant, on May 1, 1923, at Camden aforesaid, in said division and district aforesaid, so having devised the scheme for obtaining money

and property by means of false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are incorporated by reference thereto, in this count, as fully as if they were here repeated, for the purpose of executing said scheme, and attempting so to do, unlawfully, wilfully, knowingly and feloniously, did place and cause to be placed a certain letter in the post office of the United States at Camden aforesaid, together with application blank and a purported reprint from Mining and Financial Record, Denver, Colorado, May 19, 1923, the same being enclosed with said letter, there to be sent and delivered by the post office establishment of the United States to another of said persons to be defrauded, that is to say, said letter together, with enclosures, being addressed to Mr. J. W. Swanson, P. O. Box 172, Glenmore, La., said letter being of the tenor following, to-wit:

50 for 10. Have a Seat

Smackover Jack Pot, Camden, Arkansas

April 30, 1923.

Mr. J. W. Swanson, Glenmore, La.

DEAR SIR: We know you are interested in the opportunities offered in the Smackover field, or you would not have filled out the application in the Police Gazette.

We tried to give you such information that might enable you to decide to play a few hands with us in the great game and make a clean up with us.

[fol. 18] You were not lucky to get in on the 50% whack up for April, but you can secure a hand and come in for the big "div-y" we expect to make in May.

There are many opportunities offered every day to secure interest in drilling wells, and off-set acreage that will make big money for us. If you boys will shoot along the Ten Spots fast enough, we can pick up more of these bargains and make real money for the players.

We are enclosing application blanks for your convenience, and you can shoot along as many Tens as you desire. We will issue you a fully paid $50.00 Certificate for each $10.00 for a short time longer.

Trusting you will be fortunate enough to come in with us before the price of our Certificate is advanced, we are

Yours very truly, Smackover Jack Pot. Bob Kercheval, Dealer.

That at the time of the placing and the causing to be placed said letter, with enclosures, in the post office of the United States as aforesaid, the defendant then and there well knew that said letter, and enclosures, was for the purpose of executing said scheme. Contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the United States of America.

Sixth Count

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that said defendant, on February 26, 1923, at Camden aforesaid, in said division and district aforesaid, so having devised the scheme for obtaining money and property by means of false and fraudulent pretenses, representations and promises described in the first count of this indictment, the allegations concerning which in said first count are incorporated by reference thereto, in this count, as fully as if they were here repeated, for the purpose of executing said scheme, and attempting so to do, unlawfully, wilfully, knowingly and feloniously, did place and caused to be placed a certain letter in the post office of the United States at Camden aforesaid, together with partial payment application blanks, the same being enclosed with said letter, there to be sent and delivered by the post office of the United States to another of said persons to be defrauded, that is to say, said letter, together with enclosures, being addressed to Mr. M. G. Schultz, 53 W. 63rd St., Chicago, Ill., said letter being of the tenor following, to-wit:

[fol. 19] Poindexter Royalty Syndicate, Ouachita Valley Bank Building, Camden, Arkansas

Mr. M. G. Schultz, 53 W. 63rd St., Chicago, Ill.

February 26, 1923.

Dear Mr. Schultz: Received your subscription of Feb. 23rd on partial payment form together with your check for $70.00. We have given you credit for this amount on 8 Warranty Deeds as per contract and you may remit 35% of the total (which would be $200.00) each month until the total amount has been paid. We have issued the 8 Deeds in your name and deposited same in the Ouachita Valley Bank at this City and when total payments have been made Warranty Deeds will be forwarded to you.

There is no question in the writer's mind but that you have made an exceptional purchase for since writing you developments in and around the Royalty of which you are a part owner have been such as to enhance the value. For instance, the Cox well today is an absolute assured thing; same being located in Section 30, and the Hughes well came in on the 22nd of this month for about 26,000 barrels, same being in Section 28. Poindexter Royalty Deeds, in the writer's opinion, within the next ninety days will be worth four or five times the amount you have paid and we are justified in raising the price and shall do so on or about March 1st. We are writing each and every one of the present holders, including yourself, and notifying them of this fact and if you should desire to participate further in Warranty Royalty Deeds you may still do so at the old price of four Deeds for $100.00 either all in cash or on a partial payment plan but it will be necessary for you to wire your reservation as we only have a limited amount of deeds available at this time.

Poindexter Royalty is so good that should you wish to dispose of same within the next six months we will agree to redispose for you on basis of two to one or market price. That will show you our implicit faith in the outcome. With this statement on our part the writer is sure you should have no hesitance in going the limit in the purchasing of this Royalty even though it be necessary for you to bor-

row some 6% or 8% money, so kindly advise by wire your wishes.

Yours very truly, Poindexter Royalty Syndicate. Dave Kercheval, President.

That at the time of the placing and causing to be placed said letter, with enclosures, in the post office of the United [fol. 20] States as aforesaid, the defendant then and there well knew that said letter was for the purpose of executing said scheme. Contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

H. M. Stevens, Foreman of Grand Jury. S. S. Langley, United States Attorney. Jas. D. Shaver, Special Assistant U. S. Attorney. H. L. Arterberry, Special Assistant U. S. Attorney.

[File endorsement omitted.]

[fol. 21] IN UNITED STATES DISTRICT COURT

ORDER RECITING WITHDRAWAL OF PLEA OF NOT GUILTY, ETC.—March 30, 1925

This day comes the United States of America by S. S. Langley, Attorney for the Western District of Arkansas, and by James D. Shaver, Special Assistant United States Attorney, and comes the defendant, Robert David Kercheval in his own proper person and by Jones & Jones, his attorneys, and by leave of court said defendant withdraws his plea of not guilty heretofore entered in this cause and files demurrer to the indictment herein. Said demurrer coming on to be heard and being argued by counsel and submitted, the court being well and sufficiently advised in the premises doth overrule the same. To the action of the court in overruling said demurrer said defendant duly excepted at the time. Thereupon said defendant in open court waives formal arraignment and says he is not guilty as charged in either of the counts of said indictment and puts himself upon the country.

[fols. 22-24] Whereupon the jury retires in charge of a duly sworn bailiff of the court.

(Trial Continued.)

Entered in U. S. District Court March 31, 1925. (Caption omitted).

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

JUDGMENT AND SENTENCE—April 27, 1925

On Motion of S. S. Langley, Esq., Attorney for the Western District of Arkansas, the said defendant, Robert David Kercheval, was brought to the bar of the court, in custody of the marshal of the said district, and it being demanded of him what he has to or can say why the sentence of the law upon the verdict of guilty heretofore returned by the jury on the first, third, fourth, fifth and sixth counts of the indictment in this cause on the third day of April, A. D. 1925, shall not now be pronounced against him, he says he has nothing further or other to say than he has heretofore said:

Whereupon, the premises being seen, and by the court well and sufficiently understood, it is by the court considered, ordered and adjudged that the said Robert David Kercheval for his offense as charged in the first count of the indictment be imprisoned in the United States Penitentiary situated at Leavenworth in the State of Kansas for the term and period of three years, and that he pay to the United States of America a fine of three hundred dollars; that the said Robert David Kercheval for his offense as charged in the third count of the indictment be imprisoned in said United States Penitentiary for the term and period of three years and that he pay to the United States of America a fine of three hundred dollars; that the said Robert David Kercheval for his offense as charged in the fourth count of the indictment be imprisoned in said United States Penitentiary for the term and period of three years and that he pay to the United States of America a fine of three hundred dollars; that the said Robert David Kercheval for his offense as charged in the fifth count of the indictment be imprisoned in said United States Penitentiary for the term and period of three years and that he pay to

the United States of America a fine of three hundred dollars; that the said Robert David Kercheval for his offense [fol. 26] as charged in the sixth count of the indictment be imprisoned in said United States Penitentiary for the term and period of three years and that he pay to the United States of America a fine of three hundred dollars.

It is by the court further considered and ordered that the terms of imprisonment herein adjudged on the third, fourth, fifth and sixth counts of the indictment shall run concurrently with the term of imprisonment herein adjudged on the first count of the indictment.

It is by the court further considered and ordered that execution may issue for the fines herein adjudged.

It is further considered, that the marshall of the Western District of Arkansas, in whose custody the said Robert David Kercheval is now here committed, receive and safely keep and convey the body of the said Robert David Kercheval hence to said United States Penitentiary without delay, and deliver him to the custody of the keeper of said penitentiary, who will receive and safely keep the said Robert David Kercheval in jail in execution of the sentence aforesaid, and in conformity with the same, for the full period of the time aforesaid.

And it is further ordered, that the clerk of this court furnish the marshal of this district with two duly certified copies of this judgment, sentence and order, under the seal of the court, one of which shall be delivered to the keeper of said penitentiary and the other returned by the marshal to this court, with a full and true account of the execution of the same.

[fol. 27] IN UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, TEXARKANA DIVISION

No. 1901

UNITED STATES OF AMERICA, Plaintiff.

vs.

ROBERT D. KERCHEVAL, Defendant

ASSIGNMENTS OF ERROR NOS. 4 AND 17—Filed April 27, 1925

Now comes Robert D. Kercheval, otherwise called "Bob" Kercheval, otherwise called "Dave" Kercheval, the defendant in the above styled cause, and who is the plaintiff in error, and in connection with his petition for writ of error says that in the record proceedings and judgment aforesaid, error has intervened to his prejudice, and files the following assignment of errors appearing upon the record in this cause which the defendant avers occurred upon the trial thereof and for which the judgment should be reversed, to-wit:

* * * * * * *

[fol. 28] 4.

The court erred in permitting Judge James D. Shaver, counsel for the Government, to state in his opening statement to the jury that defendant had entered his plea of guilty and then withdrawn it, and in refusing to reprimand counsel for making that remark in his opening statement.

[fols. 29-45] 17

The court erred in permitting the plaintiff, over the objection of the defendant made at the time, to introduce and read in evidence the Exhibit No. 44 which is a formal plea of guilty by defendant on charges in this indictment.

* * * * * * *

[fol. 46] In United States District Court

[Title omitted]

Bill of Exceptions—Filed July 21, 1925

Caption

Be it remembered that on the 30th day of March, 1925, [fols. 47-198] the above entitled cause came on for trial before the Honorable Frank A. Youmans, Judge, presiding, a good and lawful jury having been empaneled and sworn to try the issues joined, the United States being represented by its counsel S. S. Langley, United States District Attorney, and James D. Shaver, Special Assistant United States Attorney, and the defendant being represented by his counsel Jones & Jones, the following proceedings were had:

In the course of the opening statement by counsel for the Government, the defendant objected to the jury being told that he had once pleaded guilty to the charges contained in the indictment on which he was being tried, and said objection being overruled by the court, defendant duly saved his exception.

[fol. 199] Colloquy Between Court and Counsel

Mr. Shaver: We desire to introduce in evidence a certified copy of plea of guilty entered in this case by the defendant.

Mr. Jones: If Your Honor please, we object to the introduction of the paper, which is a formal plea of guilty by [fol. 200] the defendant on the charges in this indictment, because we say it is incompetent and prejudicial to the defendant.

The Court: Objection is overruled.

Mr. Jones: We except.

Said paper identified as Exhibit No. 44, being in words and figures as follows:

EXHIBIT NO. 44 IN EVIDENCE

Be it remembered that at a regular term of the District Court of the United States for the Western District of Arkansas, Texarkana Division, begun and held at the City of Texarkana, Arkansas, on the 12th day of May, 1924, that being the second Monday in said month and the day appointed by law for the beginning of said term:

Present and presiding, Honorable Frank A. Youmans, Judge.

On Monday May 24, 1924, among the proceedings had were the following, to-wit:

No. 1901

UNITED STATES

vs.

ROBERT DAVID KERCHEVAL

Indictment for Violation Section 215 Penal Code

This day comes the United States of America by S. S. Langley, Esq., Attorney for the Western District of Arkansas, and Jas. D. Shaver, Esq., and H. L. Arterberry, Esq., Special Assistant United States Attorneys, and comes the defendant Robert David Kercheval in custody of the marshal, and in open court the said defendant waives formal arraignment and says he is guilty as charged in each of the six counts of the indictment in this cause.

I, Wm. S. Wellshear, clerk of the District Court of the United States for the Western District of Arkansas, certify the foregoing to be a true and correct copy of the record of the plea entered on the 24th day of May, 1924, in the case of the United States vs. Robert David Kercheval, No. 1901, as the same appears in the record of said court in the Texarkana Division of said District.

In testimony whereof I hereunto set my hand and affix the seal of said court at office in the City of Texarkana, Arkansas, this March 30th, 1925.

Wm. S. Wellshear, Clerk. (Seal.)

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Shaver: We desire to offer in evidence as Exhibit 45 the judgment of the court on that plea of guilty.

Mr. Jones: We object, if Your Honor please, to the introduction of the certified copy of the judgment and sentence of the court because the same is incompetent, irrelevant and prejudicial to the defendant.

The Court: On what ground, Judge Shaver, do you contend that the judgment is competent?

[fols. 201-329] In the aspect that this case is in the plea of the defendant as made, I think is competent. That was something done by himself, but as is apparent, this particular judgment is the judgment of the court on the plea, and is not the act of the defendant. That was afterwards set aside, and as was stated, I think it is stated on both sides, the plea of guilty was withdrawn—he was permitted to do that and enter a plea of not guilty. I do not believe that the judgment is competent.

Mr. Shaver: Nothing further than to show that the plea was not attempted to be withdrawn until after judgment and sentence was pronounced. And then when it was set aside further we can show, and will show, if necessary, that after judgment a motion was filed by defendant not to set aside the plea of guilty. He did not ask for that in the motion, but admitted in the motion that the plea had been entered and asked for the sentence to be reduced. However, we will not offer this at this time.

The Court: It may become competent in the course of the proceedings, but up to this time I doubt if it is competent.

Government rests.

DEFENDANT'S REQUESTED INSTRUCTIONS TO JURY

Mr. Jones: At the close of the Government's testimony the defendant requested the court to instruct the jury to find the defendant not guilty on each and every count of the indictment, which request for instruction the court refused to grant and denied the instruction, to which the defendant excepted.

[fols. 330-387] R. D. KERCHEVAL, the defendant in the case, being first duly sworn, testified in his own behalf as follows:

Direct examination by Mr. Jones:

[fol. 388] Q. They have read here in evidence a copy of the record of this court showing that you entered a plea of guilty to the charges made in this indictment. Now I want you to state to the jury what representations and promises were made to you, if any, that induced you to enter that plea of guilty?

A. I was offered three months in jail and a thousand dollar fine.

Q. Now state who made that offer, how the offer came to be made and where it was made, and what was done by you after the offer was made.

A. I met Mr. H. L. Arterberry, whom I understand was special assistant United States Attorney in this district. I met him on the evening of December 12, 1923, in a room on the lower floor of the Federal Building on the Texas side, and discussed my case with him following the indictment [fol. 389] that day. I asked him if he would allow me to enter a plea of guilty and take a small fine and have time to pay it in. I had no money. He said that would be impossible, but he proposed that if I would enter a guilty plea that he would recommend three months in jail and a $1,000 fine. Mr. Ira Ross came into the same room a little later and we discussed the matter further. Both Mr. Ross and Mr. Arterberry and myself. Mr. Ross acquiesced in the recommendation. Mr. Arterberry told me to consider the matter seriously and I told him I was. I told him nothing about what I would do. He told me to take my time

as I didn't have to plead before February 12, 1924. I left at that time. That was the recommendation that was proposed to be made and the conditions under which it was proposed.

Q. Go ahead. What did you do?

A. I went to New York City a short time thereafter and I was returned here into this court on May 24, 1924, returned to Texarkana in the custody of a United States Marshal and delivered to the Miller County jail. This being on Saturday morning and about 9 or 9:30 Saturday morning I was brought to this court room and I entered a plea of guilty before Judge Youmans and received sentence of three years on each count to run concurrently and a hundred dollar fine on each count on execution. I was then remanded back to the Miller County jail.

Q. After that sentence was imposed on you did you ask permission of the court to withdraw the sentence?

A. I did.

Q. I mean to withdraw the plea of guilty?

A. I did.

Mr. Jones: I offer in evidence the certified copy of the order of court entered the 12th day of May, 1924.

Said certified copy of order of the court being in words and figures as follows:

EXHIBIT No. 29

Be It Remembered That at a regular term of the District Court of the United States for the Western District of Arkansas, Tekarkana Division, begun and held at the City of Texarkana, Arkansas, on the 12th day of May, 1924, that being the second Monday in said month and the day appointed by law for the beginning of said terrm:

Present and presiding, Honorable Frank A. Youmans, Judge;

On Friday, June 6th, 1924, among the proceedings had were the following, to-wit:

[fol. 390]

No. 1901

UNITED STATES

v.

ROBERT DAVID KERCHEVAL

Indictment for Violation Section 215, Penal Code

This day comes the United States of America by S. S. Langley, Esq., Attorney for the Western District of Arkansas, and by Jas. D. Shaver, Esq., and H. L. Arterberry, Esq., Special Assistant United States Attorneys, and comes the defendant Robert David Kercheval in custody of the marshal and by Paul Jones, Esq., his attorney, and said defendant files motion to set aside the judgment and sentence of the court heretofore entered against him in the above entitled cause, and the United States by its said attorneys files response to said motion.

Said motion being heard and submitted, the court being well and sufficiently advised in the premises doth sustain the same and it is by the court ordered and adjudged that the judgment and sentence heretofore entered against the defendant Robert David Kercheval in this cause be and is hereby vacated, set aside and held for naught.

Thereupon the defendant Robert David Kercheval by leave of court withdraws his plea of guilty heretofore entered herein and now says he is not guilty as charged in either of the six counts of said indictment and puts himself upon the country.

It is by the court further considered and ordered that bail of the said defendant in this cause be and is hereby fixed at the sum of $10,000.00.

I, Wm. S. Wellshear, Clerk of the District Court of the United States for the Western District of Arkansas, certify the foregoing to be a true and correct copy of an order of said court in the cause therein entitled, as the same appears of record in my office as such clerk in the Texarkana Division of said District.

In Testimony Whereof I hereunto set my hand and affix the seal of said court at office in the City of Texarkana, Arkansas, this March 30, 1925.

Wm. S. Wellshear, Clerk. (Seal.)"

Q. Is the Arterberry named in here as one of the District Attorneys the same H. L. Arterberry with whom you made the agreement that you refer to?

A. Yes, sir.

Q. He was at that time in attendance upon the court here?

A. Yes, sir.

Q. Now where did you have that interview and receive that statement from Mr. Arterberry?

A. I was on the lower floor of the Federal Building on the Texas side.

Q. You say you were brought back to Texarkana by the United States Marshal from New York?

A. Yes, sir.

[fol. 391] Q. Had you gone to New York on business?

A. I had.

Q. You were due to appear in this court on the first day of the May term?

A. No, February 12, as I remember it.

Q. Did you appear?

A. I did not.

Q. Why didn't you appear?

A. I could not get there.

Q. Why?

A. Didn't have the finances and had been sick.

Q. You were sick and without finances. To what extent were you sick?

A. I had double pneumonia.

Q. Were you confined to your bed?

A. On February 12th, yes, I was confined to the house.

Q. You were convalescent then?

A. Yes, sir.

Q. How long had you prior to that time had this attack of double pneumonia?

A. About five weeks.

Q. During that five weeks, state whether you were able to attend to any business?

A. No, sir.

Q. And when the time came you were still confined to your house?

A. No, I was convalescent; I was around the place.

Q. Around the house you mean?

A. Yes, sir.

Q. But you were entirely without means to come to Texarkana?

A. I was.

Q. I will ask you if you at that time had on hand any deals that you expected to come through?

A. Yes, sir, I was working on some commission propositions.

Q. Did you have an office in New York?

A. Not on February 12th, but I had within a very short time thereafter, that is, I was working out of an office.

Q. You had room in an office?

A. Yes, sir.

Q. Where was the office located?

A. In the large court building on the eighth floor, Williams & Exchange place.

Q. State whether or not that is one of the principal office buildings in the City of New York?

A. It is, that is in the financial district.

Q. Exchange Place is right next to Wall?

A. Exchange Place is parallel.

Q. Williams parallels Broad and Williams Street crosses Wall Street at the City National Bank, the old Customs House?

A. Yes, sir, it does.

Q. Is there any more prominent spot in New York for office buildings than that block?

A. I would certainly say there was not.

Q. And you were doing business there at that place?

A. Yes, sir.

Q. Now did you confer with any attorney in New York with reference to your appearing in this court?

A. I did.

Q. Who was that attorney?

[fol. 392] A. I can't recall his name right now. Goodwin, 1482 Broadway.

Q. That is in Lower Borough?

A. No, that is on the corner of 42nd and Broadway.

Q. Now what advice or information did you receive with reference to your having to be here, from this attorney?

A. He told me that I could communicate with an attorney and have him appear for me for the setting of the case.

Q. Mr. Goodwin said that?

A. No, he said I could write and have an attorney.

Mr. Langley: I don't see the materiality of that.

The Court: Objection will be sustained.

Mr. Jones: Exception.

Q. I will ask you if on February 20, 1924, you wrote this letter to Mr. Keith at Texarkana, Arkansas, with reference to the setting of your case?

A. This is a telegram. I think this is the copy. Yes, sir, that is a copy of the telegram.

Q. That is a copy of the telegram that you sent to George Keith?

A. Yes, sir.

Mr. Shaver: There is no way of knowing whether this telegram ever reached Mr. Keith. I object to it because I don't know anything about it.

The Court: Objection will be sustained.

Q. I will ask you who is George Keith, or was George Keith?

A. One of the parties who was on my bond at that time

Q. He was one of the securities on your bond?

A. Yes, sir.

EXHIBIT No. 30

2/20/24.

George E. Keith, Texarkana, Arkansas:

Answering please secure attorney to appear for me and enter my plea not guilty stop sudden attack of pneumonia prevents my appearance at this time in person stop I wrote attorney to appear for me but received no response stop

attorney here advises that you can have attorney there enter my plea stop advise name of attorney and trial date so I may make arrangements to appear stop for I will come.

R. D. K."

Q. Did he live at Texarkana?

A. He lived at Camden.

Q. Why did you address him at Texarkana?

[fol. 393] A. Because he wired me from Texarkana that he was here.

Q. And on receiving his wire you sent him this telegram?

A. I did.

Q. Do you know whether Mr. Keith ever received this telegram?

A. I had service on it and it was not reported back to me.

Q. If he had not received it, under the rules of the company——

Mr. Langley: I object to it.

The Court: Objection sustained.

Mr. Jones: Exception.

The Court: Mr. Jones, I don't see it is material in any respect why he sent it. You have asked the question, you have gotten the matter in the record. You may have it identified if you will, so that you can have the benefit of it. I don't understand that there is any necessity of continuing a matter upon which you know the ruling of the court. It is sustained on the ground that it is immaterial.

Mr. Jones: Except.

Q. Did you make an effort to have your case set down for trial so you could be here?

A. I made an effort to get in touch with Mr. Keith and get him to do that.

Q. To get the case set for trial at some definite day of court?

A. Yes, sir.

Q. Did you succeed in doing that?

A. I never succeeded in reaching Keith.

Q. When were you taken in custody in New York?

A. May 19th, I believe.

Q. And you were brought back here to Texarkana?

A. That is, brought to Fort Smith and then here to Texarkana.

Q. Mr. Kercheval, were you still entirely without means to come?

A. Yes, sir.

Q. Were you confined here in the Miller County jail?

A. Yes, sir.

Q. How long was it before you were able to make a new bond?

A. 120 days.

Q. Since that you have been out on this bond fixed by the court at $10,000.00?

A. I have.

Q. Since you got out—when you got out of jail did you have any money at all?

A. I did not. About $20.00 I think.

Q. Was that all the money you had?

A. Yes, sir.

Q. Since then where have you been in business?

A. Fort Worth, Texas.

[fol. 394] The Court: Now I think that has all been gone over.

Q. You went immediately from here to Fort Worth?

A. Yes, sir.

Q. And been in business out there ever since?

A. Yes, sir.

Cross-examination by Mr. Shaver:

Q. Where were you on December 12th when this indictment was returned against you?

A. In the Federal Building here in Texarkana.

Q. And this case was set down for February 12th, was it not?

A. Set down for appearance February 12th.

Q. You were to be here on February 12th?

A. I was.

Q. Now you say after the indictment was returned and before you left here you had a conversation with Mr. Arterberry?

A. Yes, sir.

Q. In which he agreed to recommend a fine and jail sentence in your case?

A. Yes, sir.

Q. And you were to be back here on the 12th of February?

A. Yes, sir.

Q. You didn't come?

A. No, sir.

Q. Didn't you write a letter to Mr. Arterberry from New York on February 9th, asking if this matter couldn't be passed for a short while?

A. I wrote a letter. I don't have a copy. If you will show me the letter I will be glad to identify it.

EXHIBIT No. 1

New York City, N. Y., 2 9 24.

Mr. H. L. Arterberry, Spec. Ass't U. S. District Atty., Texarkana, U. S. A.

DEAR MR. ARTERBERRY: I came here some ten days ago on a (legitimate) financial deal that I expected to close in time to appear at Texarkana Court Feb. 12, 1924. I find today it is going to require a few days longer to complete this deal so I can get my commission.

To be able to complete this transaction means a great deal to my wife and self (as you know most oil men are broke) and in fact will give me sufficient finances to pay my debt to the court.

Therefore I am simply asking you to grant me the privilege of appearing before the court to make my plea the last days of this session; this gives me time and works no hardships on anyone concerned.

Under no condition do I wish to put my bondsmen to [fol. 395] one moment of worry, or the Gov't to any additional expense in my case.

I want to reassure you that it is my desire to get this matter settled at the earliest possible date. I am simply

asking for the longest extension you can give so that I may be assured of sufficient time to complete my deal.

Thanking you for all courtesies, I beg to remain, most respectfully,

Robert D. Kercheval.

Hotel Seville, 117 West 58th Street, New York City.

P. S.—Please notify the date I must appear."

Q. I will ask you if that is the letter?

A. Yes, sir.

Q. You made no statement on account of not coming on account of sickness?

A. I did not.

Q. I will ask you if you didn't receive a wire from the district attorney advising you that you would have to be here on that day?

A. I received a wire and the contents was similar to that.

Q. I will ask you if you didn't wire back that you were coming?

A. As I remember, I wired three different wires I am coming.

Q. But you didn't come?

A. I didn't that day.

The Court: Did you mean some other day?

(No audible answer.)

Q. Now then you got a wire from Mr. Langley, the district attorney, that you would be expected to be here on the 12th as stated?

A. I received some kind of telegram.

Q. Well, you sent that in answer to that telegram? You responded "I am coming?"

A. Similar words to that.

Q. You were notified then that you were to be there on the date it stated?

A. I don't say it is the 12th. I don't say what was in that telegram positively, without seeing it.

Q. But you didn't come after you said you were coming?

A. I didn't come on that date.

Q. The only time you did come was when you were brought by the marshal in May?

A. It was.

Q. Do you know whether or not your bond was forfeited because of your non-appearance?

A. I don't know.

Q. You learned afterwards it was?

A. I did.

Q. Now when you got here in May, you got here about the 19th of May?

A. I think it was.

Q. You entered your plea of guilty on the 24th of May?

A. I beg you pardon. I said I left New York the very day I was arrested.

[fol. 396] Q. On the 24th of May I will ask you if in the district attorney's office, at which time Mr. Ira Ross was present, in which you were discussing your pleading guilty to this charge, and Mr. Langley told you then that any agreement or promises ever outstanding that had heretofore been made, was all off because of the fact that you had not come here, on the date you were due, and that if you pleaded guilty it would be upon your own voluntary motion and he would not make any recommendation at all?

A. Mr. Langley told me he would not make any recommendation, but he didn't tell me—I didn't tell him anything about Mr. Arterberry.

Q. Well, after he then told you that, you then came into court voluntarily and entered your plea of guilty?

A. I did.

Q. I will ask you if Judge Youmans didn't turn to Mr. Langley and ask him if he had any recommendations to make in your case and he said he had none?

A. I recall his only asking me if I had anything to say.

Q. Do you recall the other?

A. I don't believe I do.

Q. Do you recall the judge turning to me and asking me?

A. No.

Q. I will ask you if Judge Youmans didn't turn to you and say: "Mr. Kercheval, have you anything to say?"

A. I think my answer was "Nothing to say."

Q. Wasn't Mr. Arterberry in town that day?

A. I think he was in the court room.

Q. Did you ask Mr. Arterberry to make any statement in connection with your case?

A. I did not.

Q. You made no request?

A. No, sir.

Q. Now I will ask you if you didn't on some days after that file a motion in this court asking the court to reduce the punishment assessed against you?

A. Yes, sir.

Q. I will ask you if in that motion—you hadn't pleaded guilty and that you did not ask in that motion for the judgment to be set aside?

A. I would like to see that before I state it.

Q. Look and see if it isn't signed and sworn to by you?

A. Yes, sir.

Mr. Shaver: We offer this in evidence with the privilege of putting in a certified copy.

[fol. 397] EXHIBIT IN EVIDENCE

No. —

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, TEXARKANA DIVISION

UNITED STATES, Plaintiff,

vs.

ROBERT D. KIRCHEVAL, Defendant

Motion to Set Aside Judgment and Order Sentencing Defendant, Robert D. Kircheval, to Three Years' Imprisonment and for Reconsideration of the Penalty to be Imposed

Your petitioner, Robert D. Kircheval, represents and shows to the court that at the November term, 1923, of this court, he was indicted for fraudulent use of the United States mail, and that on May 24th, 1924, he entered a plea of guilty to said indictment and was thereupon by the judg-

ment of this court sentenced to three years imprisonment in the penitentiary on said plea of guilty.

Your petitioner respectfully moves the court to set aside and annul said judgment of the court under which he was sentenced to three years in the penitentiary on his said plea of guilty and to grant to your petitioner an opportunity to present to the court for its consideration the facts and circumstances under which said plea of guilty was entered, and also the facts showing your petitioner's connection with and the acts and things done by your petitioner in and about and relating to the various transactions recited in said indictment.

And your petitioner respectfully represents to the court that the sentence of three years imposed upon him on his plea of guilty under the facts and circumstances, is excessive and should be annulled and set aside for the following reasons:

On the evening of the 11th of November, 1923, I met Mr. S. S. Langley in front of the Cosmopolitan Hotel and went over with him to the depot and he, my wife and myself sat down together to talk over the matter. I told him I had been put under bond to appear on November 12th and that I was anxious to get back to Dallas that night and I would be glad if I would be allowed to go, and that I would return whenever requested to do so. Mr. Langley told me that these oil cases were in the hands of Mr. Arterberry and that he was in absolute charge of all oil cases and whatever Mr. Arterberry would do or did in relation to these cases would be satisfactory to him. He stated in this connection that Judge Shaver was associated in these cases for the Government. I saw Mr. Arterberry the next morning, November 12th, 1923, in the District Attorney's office in the Arkansas Federal Building and he promptly agreed that I might return to Dallas and be subject to call.

On December 12th, after the indictment was returned, Mr. Marshall in the presence of Mrs. Kircheval told me that [fol. 398] he had had an interview with Mr. Arterberry, Mr. Shaver and Mr. Ross and that he had an appointment to meet them in the Federal Courthouse on Texas side that afternoon in relation to the indictment against me. Marshall met Mr. Arterberry there that evening and my wife

and I waited outside of the building during the interview. After the interview Mr. Marshall came out of the building and stated to me that Mr. Arterberry had consented to recommend to the court on my pleading guilty that my punishment be three months in jail and a fine of One Thousand ($1,000.00) Dollars. I went into the Texas Federal Building and saw Mr. Arterberry and tried to induce him to recommend a fine of Twenty-Five Hundred ($2,500.00) Dollars and no imprisonment. Mr. Arterberry stated that he did not believe that the court would accept this recommendation if he made it, but that he was positive that if I pleaded guilty the court would act upon his recommendation that I be fined One Thousand ($1,000.00) Dollars and three months imprisonment and that this would be the penalty the court would impose on me.

I was to appear in court on February 12th, 1924. On or about February 8th, 1924, I was dangerously ill in New York City with double pneumonia and was confined to my room at 18 West 72nd Street, and I then wrote a letter to Mr. Arterberry saying that I was sick and I also stated to him in that letter that I was on a deal in New York which required my personal attention and that I would appear in the court at Texarkana as soon as possible and that I would put the Government to no expense in bringing me to Texarkana. I also stated to Mr. Arterberry in this letter that I was broke and had no money and that it was necessary for me to put over this deal to enable me to come to Texarkana.

Before writing to Mr. Arterberry I conferred with my attorney in New York and discussed with him whether or not I should send a doctor's certificate as to my condition. My attorney told me that he did not think this was necessary and advised that I write the facts to Mr. Arterberry which I did.

I also wrote to my bondsmen and informed them that I could not be present in Texarkana on February 12th and told them I had no money to employ an attorney at Texarkana and suggested to them that they employ an attorney there to appear for me and make statement to the court explaining why I could not be present on February 12th. It now appears that they did not write to an attorney at Tex-

arkana nor employ one there. I did not know this until after I came to Texarkana.

On February 12th I received the following telegram from Mr. S. S. Langley:

[fol. 399] Texarkana, Ark., Feb. 12, 1924.

Robert D. Kersheval, care Hotel Seville, 117 West 58 St. New York, N. Y.:

You should appear here today stop advise if you are coming.

S. S. Langley, U. S. Attorney.

On the same day I replied to this telegram as follows:

New York City, N. Y., Feb. 12, 1924.

Attorney S. S. Langley, Federal Building, Texarkana, Arkansas:

Answering message, I am coming.

R. D. Kircheval.

On February 20th, 1924, I received a telegram from Mr. George E. Keith, one of my bondsmen, as follows:

"Wire immediately let me know when you will arrive Texarkana."

I replied to this telegram on the same day:

"Answering please secure attorney to appear for me and enter my plea not guilty stop sudden attack of pneumonia prevents my appearance at this time in person stop I wrote attorney to appear for me but received no response stop attorney here advises that you can have attorney there enter my plea stop advise name of attorney and trial date so I may make arrangements to appear for I will come."

On February 21st Mr. Keith wired me as follows:

"Leave on next train for Camden important answer immediately."

To this telegram my wife replied by night letter, February 21st as follows:

"Robert better but cannot leave yet. Wired you Texarkana yesterday how to proceed. Did you get message. If not call Western Union there. Tried to phone you tonight wires down calling Friday night after eight."

Mrs. Robert Kircheval.

On the morning of May 24th I went into Mr. Langley's office and shook hands with him and he asked me why I wired him as I did and did not come, and in reply I explained fully to Mr. Langley why I had not appeared sooner and told him that my telegram did not state any definite date when I would appear and he did not wire me in reply to my telegram what day to come. I told him that my wife was without means or sustenance and that I expected to put over a deal any day which would bring money to take care of my wife in any event as to the result of this prosecution, and I fully expected to be able to put this deal over [fol. 400] at any time. I told Mr. Langley that my wife was not a business woman and that she had never earned a dollar since we were married, eighteen years ago, and that I thought as I was not able to appear on the 12th of February that matters would stand until the time the case was set down for trial in May.

I told Mr. Langley that I was in business in New York and was in an office at 27 William Street in the most prominent business district of the city; that I was in the office of C. J. Taylor & Company and was sending out mail daily giving this address and was calling up business connections on an average of fifteen calls a day and that I was well known in that district, all of which went to show that I was not trying to avoid the prosecution in this case. Mr. Langley stated to me that he would not himself make any recommendation in this case. I certainly did not understand from Mr. Langley that Mr. Arterberry would not make the recommendation that he promised me he would make, but in view of my conversation with Mr. Arterberry and his promise to me, I fully expected that if I entered a plea of guilty that Mr. Arterberry would make these recommendations to the court and I entered my plea of guilty on his assurance that he would make the recommendations, and in entering a plea of guilty I relied upon his promise and

would not have entered a plea of guilty if I had not fully expected and relied upon Mr. Arterberry's promise that he would recommend to the court that on my plea of guilty my punishment would be One Thousand ($1,000) Dollars fine and three months confinement. I was utterly surprised and dumbfounded when Mr. Arterberry failed to make this recommendation, and the court immediately sentenced me without any recommendation from Mr. Arterberry.

My relation to the several transactions recited in the indictment and the acts and things done by me in this respect are and were as follows:

I was trustee in the following concerns:

1. Poindexter Royalty Syndicate

This trusteeship owned one-fourth royalty on five hundred acres in what is commonly known as the Stephens field. This one-fourth royalty on five hundred acres was divided in one-thousand parts each part being offered for sale at Twenty-Five ($25.00) Dollars. We sold about four hundred parts at Twenty-Five ($25.00) Dollars each. Ten Thousand ($10,000) Dollars. This lease was owned by the Standard Oil Company of Louisiana and they began drilling on this lease on March 20th, 1923. The Standard Oil Company capped the well and there was no production as far as I know. It is usually understood that when a well is capped it is a producing well or that they have found strong indications of oil. The Ten Thousand ($10,000) [fol. 401] Dollars received for the royalty was used in paying for the interest in the royalty, expenses of operating the trust, all of which is shown by the books.

2. American Finance Corporation

This was a brokerage business and advertised to sell stocks of any and all companies operating in what is commonly known as the Smackover field, which concern received the ordinary brokerage as paid by various concerns that wished to sell their stocks. This Company did not take in over One Thousand ($1,000) Dollars and the expenses exceeded the amount of money taken in.

3. Smackover Jack Pot

This company bought, sold and handled leases, productions, and other business enterprises connected with the oil industry. The trust agreement provided for One Million ($1,000,000) Dollars which amount was later increased to Five Million ($5,000,000) Dollars, divided into units of Fifty ($50.00) Dollars each. This trusteeship received about Ten Thousand ($10,000) Dollars in money from the sale of the units. This money was expended in the buying of an interest in a drilling well, the buying of an interest in a lease and the general expenses of the operation of the trust including the office force. These expenditures exceeded the amount of money taken in, Ten Thousand ($10,000) Dollars, and I paid the balance out of my own pocket.

In handling the business of the three companies above mentioned I did not receive a dollar for salary and only used sufficient for bare living expenses. I devoted my entire time and attention to the business and my wife assisted me in handling the business without salary, and neither she nor I received a dollar for our services. The net result of the operation of the three concerns was that I paid out of my own individual funds as much as Twenty-Five Hundred ($2,500.00) Dollars cash and gave personal notes for Forty-Five Hundred ($4,500.00) Dollars which are now outstanding and which I am at this time unable to pay. All of the expenses in the operation of these enterprises were ordinary and legitimate expenses and the books of the three companies show this and also all receipts and disbursements. Balance sheets have been taken from the books and were mailed to Ira Ross, Post Office Inspector at Little Rock, Arkansas, at his request. The books are in Waco, Texas, and are available and will be presented if desired. I kept Mr. Ira Ross, Post Office Inspector of this District, located at Little Rock, Arkansas, fully informed of my activities and mailed him duplicate copies of the various letters I sent out which embraced practically all of the business and furnished him a complete statement on his request prior to the indictment.

[fol. 402] Wherefore, your petitioner respectfully submits to the court that on the facts stated which are the true

facts in this case, if your petitioner was guilty of violating the postal laws of the United States in any particular, such violation was technical and involved no moral terpitude, and the sentence imposed upon him by the court on his plea of guilty is excessive, and in view of all the facts and circumstances your petitioner submits that the court should set aside and annul the sentence of three year's imprisonment imposed upon him and impose the sentence of One Thousand ($1,000) Dollars fine and three months' imprisonment which Mr. Arterberry stated to your petitioner that he would recommend to the court, all of which is respectfully submitted for the consideration of the court.

Jones & Jones, Attorneys for Defendant.

Robert D. Kircheval being duly sworn on oath says that the facts stated in the foregoing petition are true.

Robert D. Kercheval.

Subscribed and sworn to before me this 6th day of June, 1924. Wm. S. Wellshear, Clerk. J. Warren Stevens, Deputy Clerk. (Seal of the District Court, U. S. A., Western District of Arkansas.)

Filed Jun. 6, 1924. Wm. S. Wellshear, Clerk, by R. F. Salzman, Deputy Clerk.

EXHIBIT IN EVIDENCE

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, TEXARKANA DIVISION

No. 1901

UNITED STATES

vs.

ROBERT DAVID KERCHEVAL

Response to Motion to Set Aside Judgment and Order Sentencing said Defendant

Now comes H. L. Arterberry, Special Assistant to the United States Attorney, for the Western District of Arkansas, and for response to the motion filed by the plaintiff,

Robert David Kercheval, herein would represent and show to the court as follows:

That at the November term, 1923, of this court, the defendant, Robert David Kercheval, was indicted on a charge of violating section 215 of the Penal Code to-wit: Using the mails to defraud. The said indictment was returned in open court on December 12, 1923, that subsequent to the return of said indictment, the defendant, Robert David Kercheval, came to see this respondent with reference to his [fol. 403] entering a plea of guilty to said charge and asked what recommendation would be made with reference to the sentence which would be imposed by the court. Your respondent immediately got in touch with the postoffice inspector, Ira Ross, who had charge of this case and who worked up the facts upon which this case was presented. Mr. Ross advised that he thought a fine and jail sentence would be sufficient punishment upon the defendant's plea of guilty to the charge which was to be had on February 12, 1924. I advised the defendant to be present in court on the date indicated, to-wit: February 12, 1924, at which time the court had set for hearing of all dilatory pleas to various indictments that had been returned into court, charging violation of section 215 of the Penal Code. The defendant, Kercheval, advised that he would be present on the date and insisted that the Government go to no further trouble or expense with reference to his case that he would enter a plea of guilty to the charge on February 12, 1924, as hereinabove stated.

Your respondent would further represent and state to the court that he advised the defendant, Kercheval, that his recommendations with reference to penalty imposed might not be sought as the court was not bound by any recommendations made by the District Attorney or any of his assistants and the defendant so understood and was so told.

Your respondent would further show that the defendant failed to make his appearance on the date agreed upon, viz.: February 12, 1924, but instead a letter was received from the defendant who was then in New York City stating that he was busy and was trying to make some money and upon receipt of said letter the District Attorney immedi-

ately wired the defendant that his appearance was desired in this court at once, to which the defendant responded, "I am coming." Signed Robert David Kercheval, which was the last notice that was had from the defendant as to where he was, what he was doing or what he intended or expected to do in the future with reference to his case and immediately thereafter "Nisi Judgment" was taken upon the defendant's bond.

Your respondent would further represent to the court that he had no further dealings or transactions with the defendant with reference to his said case, other than is hereinbefore mentioned. That upon the return of the defendant here from New York by his bondsmen this respondent had no further conversation with the defendant with reference to any recommendations whatsoever and your respondent is informed by the District Attorney that he advised the defendant at said time that all promises with reference to any such recommendations was of no further force and effect and that none would be made and that the [fol. 404] defendant was not misled in any way by any one to induce him to enter his plea of guilty as stated by him in said motion.

Wherefore your respondent submits the above as a response to the allegations as set forth in the defendant's motion to have the sentence of the court annulled and set aside, all of which is respectfully submitted for the consideration of the court with respect thereto.

H. L. Arterberry, Special Assistant U. S. Attorney.

Filed Jun. 6, 1924. Wm. S. Wellshear, Clerk, by R. F. Salzman, Deputy Clerk.

Q. Now on the motion, Mr. Kercheval, I will ask you if testimony was not introduced before the court?

A. There was.

Q. You took the stand and testified?

A. Yes, sir.

Q. And you told the court then that you had taken into these syndicates some $21,000.00?

A. I believe that is the amount.

Q. And that you had returned none of that to the investors?

A. Yes, sir.

Q. I will ask you if you didn't also state to the court in the hearing on that motion that the Jack Pot enterprise was a complete loss?

A. I don't remember making that statement, no, sir.

Q. What did you state?

A. I don't remember just what the statement was regarding that.

Q. Well, after the court heard all this testimony, the court declined to grant the motion, didn't he?

A. In what way do you mean?

Mr. Jones: The record shows that and the records have been introduced.

The Court: He may answer.

Mr. Jones: Exception.

A. The court set aside the sentence.

Q. I will ask you if the court at that time didn't refuse to set it aside and declined to grant the relief prayed for in the motion?

The Court: Answer the question.

A. I don't understand it.

Q. I asked you if the court didn't decline to grant the motion or the relief prayed for, or to disturb the judgment that had been rendered?

A. I am honest with you. I don't know what that means.

Q. Didn't the court decline to set the judgment aside as prayed for in your motion?

A. He declined to give me three months in jail.

[fol. 405] Q. Then Mr. Jones asked the court to permit you to withdraw your plea of guilty and enter a plea of not guilty, didn't he?

A. Not until after the Judge had said—I don't remember just exactly what he said.

Q. Don't you know that that was after he had declined to grant the relief prayed for in your petition?

A. No, sir.

Q. Didn't the court say—don't you remember the expression of the court that it would be a judicial farce to put a man in jail when he got away with $21,000.00?

A. I don't remember that.

Q. And finally the judge said he had decided to set aside your sentence and let you plead not guilty?

A. I remember the Judge set it aside.

Q. The same facts exist today as existed then, did they not, with reference to your transactions?

A. Well, there are different conditions exist- today.

Q. With reference to what you had done?

A. Oh, no.

Q. The same facts were in your knowledge and your possession when you pleaded guilty, that you have now?

A. How was that?

Q. I say you had the same facts within your knowledge when you pleaded guilty, that you have now?

A. No, sir, I know a lot of facts now that I didn't know then.

Q. I am asking about the case before the court. I will ask you again if the facts were not the same, so far as this charge was concerned, at the time you pleaded guilty, as they are now?

A. Yes, sir, same charge.

Q. And you had knowledge of those facts. Why didn't you ask Mr. Arterberry to say something when the court asked Mr. Langley and myself if we had any recommendations?

A. I take*n* it for granted that he would.

Q. You heard the judge ask Mr. Langley and me and you heard us say we didn't have any recommendations?

A. I relied on Mr. Arterberry doing as he agreed.

Q. That was when you were indicted. He never told you that then. What did you go and talk to Mr. Langley for?

A. I was delivered to Mr. Langley's office. The Marshal brought me up here.

Q. You asked the Marshal to let you go in there?

A. I don't remember how that was.

Q. Do you remember hunting Mr. Langley?

A. Yes, sir.

Q. Why didn't you ask for Mr. Arterberry then?

A. I didn't see Mr. Arterberry.

Q. Did you tell Mr. Langley what Mr. Arterberry had told you?

A. I did not.

[fol. 406] Q. He told you that the recommendations were off?

A. No, sir.

Q. What did he tell you?

A. He told me that he wouldn't make any recommendations.

Q. That is what I asked you. I will ask you if he didn't state to you right there in the office when you went in there that any recommendations that had been made by his assistants had been made without authority and it was all off?

A. He did not.

Q. Wasn't Mr. Ross in the office when that occurred?

A. No, sir.

Q. And Mr. Langley didn't make that statement to you, if he didn't tell you that if any of his assistants had made any recommendations or promises to you, that it was without authority and that it was all off?

A. No.

Q. And that there would be no recommendations?

A. He said he would make no recommendations?

Q. He was the man you were talking to?

A. I was talking to him at that time.

Q. You were not hunting Mr. Arterberry and was talking to Mr. Langley at that time?

A. No, sir.

Q. So you pleaded guilty with full knowledge of the situation?

A. No.

Q. What was lacking?

A. I didn't have Mr. Arterberry's statement that he would make no recommendation.

Q. You didn't ask for it. The only thing you were complaining of was that you got more than you ought to?

A. I didn't think I ought to have got anything and I just agreed to take a light sentence.

Q. And you got more than you thought you were going to get?

A. I certainly did.

Q. When did you say you went down to Camden to go into this oil promotion?

A. I went to Camden in December, as I remember it.

Q. 1922?

A. 1922.

Q. Where did you go there from?

A. New York City.

Q. You had been in the promotion game in New York?

A. I had not.

Q. Wasn't you connected with the Daskos for selling stock?

A. I was not.

Q. Wasn't you indicted in New York?

A. The Tex-York Company.

Q. Wasn't you up there selling stock in New York in Texas oil?

A. I was not.

Q. Wasn't you indicted up there for your connection with that concern?

A. I was.

Q. That indictment has not been disposed of?

A. I don't know.

[fols. 407-440] Q. Now you were engaged in selling some kind of stock.

A. I was engaged in selling general securities.

Q. Well, did you sell any of the Tex-York Company?

A. No, sir.

Q. The Texas Oil Producing Co., wasn't you one of the trustees in the Texas Oil Producing Company?

A. I was not.

Q. What connection did you have with it?

A. I had a connection as sales manager.

Q. The sales manager does not have anything to do with the selling of stock?

A. That was away back in 1919.

Q. Wasn't you in New York in 1919?

A. I was for a short time.

Q. How long did you stay in New York?

A. In 1919?

Q. Yes.

A. I think I was there about thirty days.

Q. What were you doing then?

A. I went up there to deliver that Texas Oil that you are talking about to a brokerage house to sell.

Q. That was a Texas corporation?

A. No, sir.

Q. Declaration of Trust?

A. Yes, sir.

Q. That seems to be your favorite manner of operating isn't it?

A. Well, I don't know.

Q. Well, who does?

A. I was just trying to think, Your Honor. I believe that is about as good a method of operation as any. The Magnolia Petroleum Company operates under a declaration of trust.

Q. So in 1919 you were operating with the Texas Oil Producing Company. Where were your headquarters?

A. Headquarters as I remember it was in Waco, Texas.

Q. How long had you been connected with that when they sent you to New York?

A. It had just been organized.

Q. And you went up to New York for what purpose?

A. To secure a firm to underwrite the issue.

Q. Explain to the jury what you mean.

A. They were to take over the issue of stock and dispose of it upon some basis that we might agree upon and the Texas Oil was to have the proceeds derived from that stock for operating purposes.

Q. That is the one you were indicted for in New York?

A. That is the one.

[fol. 441] S. S. Langley, a witness sworn on behalf of the United States, testified as follows:

Direct examination by Mr. Shaver:

Q. Your name is S. S. Langley?

A. Yes, sir.

Q. What official position do you hold?

A. United States District Attorney for the Western District of Arkansas.

Q. How long have you been filling that position?

A. Since May 21, 1921.

Q. You were acting as United States Attorney for the Western District of Arkansas at the time of the indictment of the defendant?

A. I was.

Q. I will ask you if you had a conversation with the defendant prior to the return of the indictment into court while the matter was under investigation?

A. Yes, sir, twice I think.

Q. I will ask you if in that conversation there was anything said by the defendant to you with reference to his being here at a certain time?

A. Yes, sir.

Q. State to the jury what that conversation was.

A. The first conversation with regard to Mr. Kercheval being here at a certain time was some time just prior to the returning of the indictment. I don't remember the exact date.

Q. I will ask you at that time he was not already under bond?

A. Mr. Kercheval represented that he was under bond and he wanted permission to go back to Ft. Worth, was the only question presented to me, and wanted to know what time to return and I told Mr. Kercheval with regard to that proposition, which was the only thing being talked about, the time for him to return back to answer, and I told him that I wasn't advised as to when he was needed, and for him to see Mr. Arterberry, the assistant, and any arrangements he made with Mr. Arterberry concerning his return would be entirely satisfactory to me.

Q. That was before the indictment was returned?

A. That is my recollection.

Q. I will ask you if it isn't a fact that the grand jury recessed during November until the 12th of December?

A. Yes, sir.

Q. And it was during that time that you had your conversation with Mr. Kercheval?

A. Yes, sir.

Q. Well, do you recall whether or not he was here on the 12th of December?

A. About that time, when the indictment was returned. My recollection is that he was about that time. I don't remember the exact time. I think he was here.

[fol. 442] Q. Did you have any conversation with him with reference to the matter further?

A. No, sir, not at that time.

Q. I will ask you if it was not a fact that the 12th of February was set down as a date to plead to these indictments?

A. That is my recollection.

Q. Well, was Mr. Kercheval here on the 12th of February?

A. I think he was about that time.

Q. I will ask you if you didn't receive a letter from him and he was not here the 12th of February? You heard the letter read here yesterday dated February 9th?

Q. Yes, sir, that letter was handed me by Mr. Arterberry.

Q. Did you or did you not wire Mr. Kercheval in response to that letter?

A. I did.

Q. You heard the message read that is set out in the motion, you advised him that he must come?

Mr. Jones: Wait a moment.

The Court: I don't understand there is any dispute about that telegram.

Mr. Jones: If that is the telegram, I withdraw my objection.

Mr. Shaver: That is the telegram I am inquiring about.

Q. Did you get a response from Mr. Kercheval to your telegram advising him he must be here?

A. I did.

Q. And that is the telegram set out in the motion, is it not?

A. Yes, sir.

Q. That he was coming?

A. Yes, sir.

Q. Well, he did not come, I believe he said?

A. No, sir, he didn't come at that time.

Q. Well, was there any steps taken in the case further at that time?

A. Well, just within a few days of the time after receiving that telegram, I waited until Mr. Kercheval would have had time to have gotten here and then I took a forfeiture on his bond.

Q. Now after that when did Kercheval appear here?

A. Now, let me modify that statement. I don't think I was present when the forfeiture was taken. I think it was a day or two after that, we waited for Kercheval, and I think you or Mr. Arterberry took the forfeiture.

Q. Well, after the bail bond was forfeited, when did you see Kercheval?

A. I don't remember the exact date. The date is in this pleading, whatever date that was.

Q. Well, he was arrested some time in May and brought here from New York?

A. It was some time in May, 1924.

Q. Now, after he had been brought back here and was in jail, did you see him before he entered his plea of guilty?

A. Yes, sir.

[fol. 443] Q. State to the jury the circumstances under which you saw him and what occurred, and what was said?

A. Mr. Kercheval came to my office back here in the building the morning before he entered his plea of guilty, and I am under the impression that he came in and requested as I remember it, he came in and requested an interview. I know that I had not sent for him. He came in and wanted to talk with me. He sat down in the room there, he was in the custody of the marshal.

Q. Who was in the room besides yourself?

A. Well, Mr. Ira Ross.

Q. Tell the jury the conversation you had with Mr. Kercheval in your office that morning?

A. The substance of the conversation amounted to this: Mr. Kercheval told me that there had been promises made to him by Mr. Arterberry concerning certain recommendations to be made to the court in case he plead guilty. I advised Mr. Kercheval very positively and very plainly that if such promise had been made by Mr. Arterberry or my assistants, that it was without my knowledge or consent and that he was not authorized in doing it, and there would not be any recommendation made, if he was going to enter a plea of guilty there would be no recommendation made by me or my office or assistants; that that was all of it; that he had gone away and had not appeared when he said he would, and that any promise or understanding about it

that there had been, that he could consider that all off; that there would be no recommendations made. I made that statement to him very plainly and in few words before he came on in and entered his plea. I went further than that. I told him he could take his own course and use his own judgment about what he would do.

Q. Now, it was after that statement by you in your office that he did come in and plead guilty?

A. Yes, sir.

Q. Were you in the court room when he pleaded guilty?

A. I was.

Q. I will ask you if the judge didn't turn to you and ask you if you had any recommendations?

A. That is my recollection.

Q. Did you tell him?

A. I told him I had none.

Q. Do you recall whether the judge turned to me and asked me if I had any recommendations?

A. I think he did.

Q. Do you recall what I said?

A. I think you made the same reply.

Q. I will ask you if the judge didn't ask Mr. Kercheval if he had anything to say?

A. That is my recollection of what happened.

Q. That is all that transpired so far as you know with reference to this plea of guilty?

[fol. 444] A. That is in substance all that did happen so far as I am concerned.

The Court: Do you recall any requests that the court made for information with regard to the facts in the case after Mr. Kercheval had declined to make a statement?

A. Yes, sir; I think questions was asked and there was probably a statement made upon the facts.

Mr. Shaver:

Q. I will ask you if the judge didn't call on Mr. Ross?

A. I don't remember whether the court asked Mr. Ross, or asked you or me, and we requested Mr. Ross to make a statement of the facts.

Q. And that is your recollection that is the way it was done?

A. That is my recollection.

The Court: Do you remember what statement was made to the court in that connection at that time?

A. Well, only briefly in substance. I couldn't give it in detail today.

Q. Do you remember the amount of money that was stated that was obtained by these operations?

A. Yes, sir; my recollection that was stated about twenty or twenty-one thousand dollars.

Cross-examination by Mr. Jones:

Q. Mr. Langley, your recollection was first that Mr. Kercheval was here on the 12th of February, and then you corrected that. You have a great many cases for the Government involving this proposition?

A. I certainly have.

Q. The records and books are full of them?

A. A good many, right numerous.

Q. And they are all in your hands and under your control?

A. Well, I am supposed to have the control of them.

Q. Now, you don't pretend to carry in your mind all these things, do you?

A. Certainly not.

Q. It would be humanly impossible?

A. I don't think it would be possible; I couldn't do it.

Redirect examination by Mr. Shaver:

Q. Your recollection is clear, or is it not clear as to what transpired?

A. It is very clear as to what I said about it because of the fact that shortly after the plea this motion coming up. That brought it to my mind.

Cross-examination:

Q. When was this motion tried?

A. It was just a few days after the plea was entered.

Q. Do you remember when it was?

A. I think it was along towards the last of the May term, 1924.

Witness excused.

[fol. 445] IRA ROSS, a witness sworn on behalf of the United States, testified as follows:

Direct examination by Mr. Shaver:

Q. What is your name?

A. Ira Ross.

Q. What is your business?

A. Post office inspector.

Q. I believe you were on the stand the other day?

A. Yes, sir.

Q. You are the same Ira Ross that testified in this case the other day?

A. Yes.

Q. And you were one of the inspectors in charge of this investigation?

A. Yes.

Q. I will ask you, Mr. Ross, if you remember the morning that Mr. Kercheval came into Mr. Langley's office, the same being the day that he entered his plea of guilty here in court?

A. Yes, sir.

Q. I will ask you if you were present in Mr. Langley's office when Mr. Kercheval came in?

A. I was.

Q. You were there when he came in?

A. Yes, sir.

Q. I wish you would state to the jury what conversation occurred there between Mr. Kercheval and the District Attorney. Just turn around and tell them in your own way what that conversation was.

A. Well, the conversation was about as related by Mr. Langley. Mr. Kercheval said that he had been made promises by Mr. Arterberry to recommend a jail sentence in the event that he pleaded guilty on February 12th that he was willing to plead guilty and Judge Langley told him that he knew nothing about any promises; that if there had been any made that it was without his authority, and if he pleaded guilty he would have to do so without any recommendation from his office. And Mr. Kercheval said that he would enter his plea under those circumstances.

Q. The matter was made plain there, was it?

A. Yes, sir.

Q. And he then said he would enter his plea under those circumstances?

A. Yes, sir.

Q. Did he, or did he not, come into court and enter his plea?

A. I think he came out of the office in here.

Q. Were you in here?

A. I was.

Q. I will ask you whether or not you recall whether you made any statements to the court with reference to the facts?

A. Yes, sir, I was asked for a statement of the facts and related as briefly as I could the organization he was interested in and the approximate amount of money realized, so far as my investigation had shown.

Q. That was in response to an inquiry from the Judge upon the bench?

A. Yes, sir.

[fol. 446] Q. Did Mr. Kercheval have anything to say?

A. No, sir.

Q. He made no statement with reference to it at all?

A. None at all. I believe he probably admitted that the figures I gave were approximately correct.

Q. That was on the trial of the motion?

A. Possibly it was.

Q. He admitted then on the stand that the amount of money obtained was approximately $21,000.00?

A. Yes, sir.

Cross-examination by Mr. Jones:

Q. Isn't it a fact, Mr. Ross, that you were not in the office when Mr. Kercheval came in; that the conversation had proceeded to some extent before you came in?

A. No, sir, I think I was in the office.

Q. Didn't you testify at the hearing here of that motion that you were not in the office at the time Mr. Kercheval came in, but you came in afterwards?

A. I don't think so.

Q. Are you sure you didn't testify that?

A. I am pretty sure I didn't.

Q. I ask you if you are sure you did not testify that?

A. That is my recollection that I did not.

Q. Were you with Kercheval in the office when Mr. Arterberry made the statement to him that he would recommend to the court a thousand dollar fine and three months in jail?

A. No, sir.

Q. Where were you when that was made?

A. I don't know. I occupied one office down there, Mr. Thompson and I were working in one office and Mr. Arterberry and Judge Shaver occupied the office across the hall.

Q. That was in the Texas side Federal Building?

A. Yes, sir. And I was probably in the other office.

Q. Didn't you have a conversation with Mr. Marshall about this?

A. Marshall wa down there a number of times and he talked to me about this case, yes, sir. This one and his and Houston's, and the punishment that would be reasonable under the facts if he pleaded guilty.

Q. Well, he was talking about whether or not he could persuade Mr. Kercheval to plead guilty? Were you trying to persuade Mr. Kercheval to plead guilty?

A. No, sir. Marshall came to see me.

Q. Were you using him as a decoy to get people to plead guilty?

A. I wasn't using him at all.

Q. How was it he was talking to you about getting pleas of guilty?

A. In all those cases.

Q. What did you do with Marshall, finally?

A. Marshall entered a plea of guilty.

Q. What was he charged with?

A. Fraudulent use of the mails.

[fol. 447] Q. What did you recommend in Marshall's case?

A. Nothing at all.

Q. As a matter of fact he only served a term in jail?

A. I know he served a term in jail. I don't know whether there was any fine in connection with it.

Q. He only served a term in jail?

The Court: What is the object of that, Mr. Jones?

Mr. Jones: My object is to show presently to the jury the proposition of whether or not this man wasn't using Marshall to induce people to plead guilty, and as a compensation for that Marshall received less sentence on his recommendation.

The Court: You have already passed from that point. You asked whether he was using him as a decoy. He says he was not. And the punishment that was inflicted on Mr. Marshall has not a thing to do with this case.

Mr. Jones: Your Honor understands the purpose.

The Court: No, I am entirely ignorant and I can't see what purpose you have in asking that question.

Mr. Jones: I will state, if Your Honor please, in asking the question if he had not agreed to recommend less sentence.

The Court: And he answered that he had not.

Mr. Jones: Then I wanted to show that a slight sentence was in fact inflicted upon Marshall, to sustain the position that I take that he had recommended a slight sentence.

The Court: You had already had the answer from the witness that he had not made the recommendation. You had gotten that information fully and completely on your own inquiry, and you are bound by it. Please proceed.

Q. I will ask you if after Mr. Kercheval had served his 120 days in jail on the forfeiture of his bond, if you didn't come to him right out in this hall and ask him to plead guilty in this case, and if he did so that you would recommend a slight sentence?

A. No, sir, I did not.

The Court: When was that, Mr. Jones?

Mr. Jones: After the forfeiture and after Kercheval had been in jail.

Q. You say you did not?

A. No, sir.

Q. Didn't you talk to Mr. Kercheval along the line that his service in jail would be taken, you would recommend that that be taken into consideration in the term he was to serve in jail if he pleaded guilty?

A. I will tell you that conversation as near as I can. Mr. Kercheval asked me in the hall if he pleaded guilty

again if I would recommend that he be sentenced to the time he had been in jail and I told him I couldn't do that.

Q. You told him what?

A. That I would not do that.

Q. Mr. Ross, do you remember coming to me and talking to me about this case?

A. No, sir.

[fol. 448] Q. Do you remember coming to me and telling me of this conversation you had with Kercheval?

A. No, sir, I don't think so.

Q. Don't you remember coming to me? Do you remember coming to me and talking to me about the Kercheval case?

A. No, I don't Judge.

Witness excused.

Government rests.

R. D. Kercheval, being recalled, testified in his own behalf in rebuttal as follows:

Direct examination by Mr. Jones:

Q. Was Mr. Ross in the office when you were in there to talk to Mr. Langley?

A. He was not.

Q. How long had you and Mr. Langley been talking about this?

A. I was just about ready to leave the office and come into the court room when Mr. Ross came in.

Q. Had you had a talk with Mr. Ross before Mr. Arterberry made you this promise?

A. No, sir.

Q. Did you have a talk with him after that?

A. Had a talk with him in conjunction with Mr. Arterberry as he was in the room at the same time. Came out of his own office across the hall and walked in.

Q. His office was right across the hall?

A. Across the hall from where Mr. Arterberry was.

Q. Had Marshall made overtures to you to plead guilty in this case?

A. He had.

Q. How long had that been going on?

A. Only began that day.

Q. Did he go with you down to Arterberry's office and down to the Federal Building?

A. No, he went ahead of me and told me to come down later.

Q. Did you find him there?

A. I did, waited for him to come out.

Q. Were you informed?

A. Notified me that he could get a recommendation of three months in jail and a thousand dollars fine.

Mr. Shaver: We object to that.

The Court: Objection sustained.

Q. The next question I asked you was if you did get the promise of a recommendation would be made by Mr. Arterberry?

The Court: Are you talking about the conversation with Mr. Arterberry?

Mr. Jones: Yes, sir.

A. I immediately walked in and saw Mr. Arterberry and got that agreement from him.

[fols. 449-462] Q. What time of day was that?

A. It was after the dinner hour in the evening. Probably 7 or 8 o'clock in the evening.

Cross-examination by Mr. Shaver:

Q. Marshall was negotiating for you, was he?

A. Marshall came to me and went down to see Mr. Arterberry.

Q. He went to Arterberry as your friend?

A. I don't know how much my friend.

Q. Well, you sent him there to see Arterberry?

A. I didn't.

Q. How did he happen to go?

A. He went of his own accord.

Q. But you say he came to see you. What did you authorize him to do?

A. Didn't authorize him to do anything.

Q. Yet you waited until you got a report before you went in?

A. I didn't.

Q. But he had attended to it for you?

A. I was waiting to see what his report was. He told me he would give me one.

Q. So he was acting in there as your representative?

A. No, sir, he went in to get a report. No authority to make any kind of deal.

Q. Well, then the deal was not authorized?

A. No, no deal made between Mr. Marshall and Mr. Arterberry for me, none whatsoever.

Q. Well, you didn't come back here at the time you were to be here?

A. I did not.

This was all the evidence introduced at the trial of this cause.

[fols. 463-475] CHARGE OF COURT TO JURY

Mr. Shaver: There is one other matter, the plea of guilty.

The Court: The plea of guilty is introduced as evidence by the Government. You are to take that into consideration, that is, you will take it into consideration upon a certain condition. If you find that Mr. Kercheval made that plea of guilty and that no promise was held out to him for the purpose of getting him to make that plea, or if you find that he was notified before he made the plea that nothing that was ever said to him with reference to it theretofore would be met, then it is evidence for you to consider in connection with the other evidence in the case. If you find out however that he was included, and you are to take all the facts and circumstances into consideration—you are to take Mr. Kercheval's intelligence into consideration in connection with whether or not he could be deceived in a matter of that kind, I say if you find that he was deceived; that this was brought about by conversations that he had had with reference to it, and that he made that plea of guilty when as a matter of fact he was not guilty, then you will disregard that particular part of it and consider just the other testimony in the case. Have you any requests, Mr. Jones?

[fol. 476] In United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1926

No. 7185

Robert David Kercheval, Otherwise Called "Bob" Kercheval, Otherwise Called "Dave" Kercheval, Plaintiff in Error,

vs.

United States of America, Defendant in Error

In Error to the District Court of the United States for the Western District of Arkansas

Mr. Paul Jones (Mr. Paul Jones, Jr., was with him on the brief) for plaintiff in error.

Mr. S. S. Langley, United States Attorney, and Mr. James D. Shaver, Special Assistant United States Attorney, for defendant in error.

Before Stone, Kenyon, and Booth, Circuit Judges

Opinion—Filed May 4, 1926

Kenyon, Circuit Judge, delivered the opinion of the court.

Plaintiff in error was tried and convicted in the District Court of the United States for the Western District of Arkansas on five counts of an indictment charging him with violation of Section 215 of the Penal Code, viz., the devising of schemes to obtain money by false and fraudulent representations, and the use of the mails in carrying out said fraudulent schemes. The first count of the indictment sets forth particularly the plan and method. The others are based on different overt acts. Defendant was acquitted on the second count.

The plan or scheme in brief was as follows: defendant promoted two oil stock companies known as the Poindexter Royalty Syndicate and the Smackover Jack Pot Syndicate, [fol. 477] the latter being a trust estate formed to engage in the general oil business. The former had an authorized

capitalization of $300,000.00, divided into 10,000 units or mineral deed assignments of the par value of $30.00 each. Defendant under the name of "Dave" Kercheval was sole trustee. The Smackover Jack Pot, the other corporation, had an authorized capital of $5,000,000.00, divided into 100,000 units or assignments of interest of the par value of $50.00 each. Defendant under the title of "Bob" Kercheval was sole trustee of this corporation. Defendant also organized a brokerage company known as the American Finance Corporation for the purpose of assisting in selling shares and mineral deeds of the other two enterprises. All of these concerns had their principal place of business at Camden, Arkansas, and were dominated and controlled by defendant. The assets of these companies consisted of some leases of oil royalties.

The representations charged in the indictment as made to induce the purchase of shares and mineral deeds were many, some of them being as follows: that defendant would declare a fifty per cent cash dividend which would be paid at a future date to all holders of shares or assignments of interest in the two syndicates; that Jack Pot was not in the class of fly-by-night concerns, but was an organization built on principle which would carry forward and grow to larger successes year after year; that it was organized so as to take charge of the changing conditions in the oil industry; that the stockholders were not gambling on the outcome of the drilling of one well; that persons who bought Jack Pot shares would be in the big "whack-up" that would come within ninety days to six months; that defendant could buy production at a tremendous discount, and that he was therefore making a special offer of four $50.00 shares for $50.00, and eight $50.00 shares for $100.00; that Jack Pot was a fair, square proposition, and there was no reason why every investor would not reap a big harvest; that defendant needed hands to harvest the oil crop of dollars he was sure to make; "that the Smackover Jack Pot ante was $10.00;" "that the sky was the limit," and "there was no rakeoff;" that the Capital Syndicate Company of Denver, Colorado, had underwritten the stock of defendant, and that the Capital Syndicate would offer for public subscription Jack Pot certificates at par, that is, $50.00 each; that said securities would be

traded in throughout the United States and Canada; that the Smackover Jack Pot had made a deal whereby it had made a profit of $13,000.00 and would pay all its stockholders on April 10, 1923, a fifty per cent dividend; that parties [fol. 478] who were not lucky enough to be in on the per cent "whack-up for April, 1923," could come in for the "'divy' which defendants expected to make in May;" that parties buying Poindexter Royalty mineral deeds would become the permanent owners, and were buying something worth every cent they were asked to pay for the same; that the "Jimmy" Cox well was less than one-half mile from the Poindexter holdings—was making considerable gas and oil, and would be one of the "gusher" type wells in the Smackover field; that Poindexter warranty royalty deeds were an exceptionally good investment.

The indictment charges that all of these representations were false and fandulent; were known by the defendant to be such and were made with the purpose and intent to induce persons to pay him large sums of money for shares or mineral deed interests of the said Companies and Syndicates, and that in truth and fact large numbers of people did make purchases thereof. The indictment sets forth in the various counts letters and advertisements which were sent through the mails. Most of them contain glowing descriptions as to the future of the two Oil Companies, statements as to dividends paid, and the alluring prospects of securing something for nothing.

The crop of gullible subjects resulted in a fruitful harvest to defendant.

On each of the five counts of the indictment upon which defendant was convicted he was sentenced to imprisonment for three years in the penitentiary and to pay a fine of $300.00, the terms of imprisonment to run concurrently.

The case is here on writ of error.

We are presented with seventy-six assignments of error. Some are clearly insufficient under the rules of this court. Some present no substantial questions. Fifteen are not argued,—hence abandoned. Lee Tung v. United States, 7 Fed. (2d) 111.

We attempt to group the various assignments as there is no necessity for taking them up seriatim.

Assignment No. 1 relates to alleged error of the court in overruling defendant's motion in arrest of judgment. This

motion was an attack upon the indictment for a number of reasons (some of which had been raised upon demurrer), [fol. 479] viz., that it did not state facts sufficient to constitute a public offense against the United States; that the allegations thereof did not state the scheme, artifice or device to defraud with sufficient certainty to inform defendant of the offense with which he was charged. This court has considered similar indictments in a number of cases in the last few years, some of which arose out of the same oil fields, and this indictment is substantially similar to the indictments in those cases so recently decided by this court. In fact this case bears a very marked resemblance to them. Every question raised here as to the indictment has been passed on adversely by the court in these cases. Marr v. United States, 8 Fed. (2d) 231; Morris v. United States, 7 Fed. (2d) 785; Chew v. United States, 9 Fed. (2d) 348; Davis v. United States, 9 Fed. (2d) 826. See also as to sufficiency of the indictment, Rimmerman et al. v. United States, 186 Fed. 307, 310; May et al. v. United States, 199 Fed. 53, 61; Gould et al. v. United States, 209 Fed. 730, 734; Mounday et al. v. United States, 225 Fed. 965; Goldberg v. United States, 277 Fed. 211.

Assignments of error 5 to 17 inclusive and 44 and 45 challenge the admission of evidence. Except Assignment 17 they relate to telegrams, advertisements, letters and circulars sent to various people to persuade them to buy shares or deeds of interest in the so-called syndicates. The objection made by defendant to them is that they are evidence tending to show that defendant schemed to make other and different representations, pretenses or promises than those set forth in the indictment. Of course, there must be proof of some overt act set out in a count to warrant conviction thereon, but proof of other similar acts for the commission of which defendant could not be convicted under the indictment are nevertheless admissible as bearing on the question of fraudulent intent, which is a material allegation of the indictment. We are satisfied the evidence objected to and pointed out in these various assignments, though not set forth in the indictment, was admissible on the question of intent and as showing the character of the scheme in which defendant was engaged. In urging objec-

tion thereto it seems to us there is a failure to recognize the distinction we have pointed out. See Samuels v. United States, 232 Fed. 536; Linn v. United States, 234 Fed. 543; McKnight v. United States, 252 Fed. 687; Holloweil et al. v. United States, 253 Fed. 865; Davis v. United States, 9 Fed. (2d) 826. Assignment 17 relates to the plea of guilty [fol. 480] entered by defendant in open court. It was a formal plea and the court in its instructions to the jury was careful to guard the same telling them:

"The plea of guilty is introduced as evidence by the Government. You are to take that into consideration, that is, you will take it into consideration upon a certain condition. If you find that Mr. Kercheval made that plea of guilty and that no promise was held out to him for the purpose of getting him to make that plea, or if you find that he was notified before he made the plea that nothing that was ever said to him with reference to it theretofore would be met, then it is evidence for you to consider in connection with the other evidence in the case. If you find out however that he was included, and you are to take all the facts and circumstances into consideration—you are to take Mr. Kercheval's intelligence into consideration in connection with whether or not he could be deceived in a matter of that kind, I say if you find that he was deceived; that this was brought about by conversations that he had had with reference to it, and that he made that plea of guilty when as a matter of fact he was not guilty, then you will disregard that particular part of it and consider just the other testimony in the case."

While there was evidence of defendant that some promise had been made him by a Special Assistant District Attorney, Mr. Arterberry, as to punishment in case he pleaded guilty, the evidence of the District Attorney shows that defendant was fully informed by him before the plea that if he did plead guilty it would be upon his own volition and that no promises whatever would be made to him. It is true in the federal courts, as stated in Ziang Sung Wan v. United States, 266 Fed. 1, 14, that "the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact voluntarily made."

There is no claim here of any compulsion applied to defendant. The court left it to the jury as to whether the plea of guilty was voluntary or made under some kind of a promise held out to him by which he was deceived. If the latter it was to be entirely disregarded. Certainly this was all defendant could claim under the facts of this record. McBryde v. United States, 7 Fed. (2d) 466. In the motion made by defendant to set aside the judgment he admits that he had pleaded guilty. The purpose was to reduce the punishment, but if this failed he asked to withdraw his plea, [fol. 481] and that the judgment be set aside. We know of no reason why the plea of guilty was not admissible under all these circumstances for what it might be worth. It was not conclusive of guilt and the court so instructed the jury. The defendant probably knew better than anyone else whether or not he was guilty. Under the evidence in this case a plea of guilty upon his part would have seemed a very reasonable thing. We see no substantial or prejudicial error in the admission of any of the evidence complained of.

Assignments of Error 20 to 43 inclusive, and 46 and 47 relate to the rejection of certain testimony offered by defendant.

Assignments 21, 22, 23 and 32 relate to the refusal of the court to permit witnesses to express opinions and to relate purely hearsay testimony, e. g., whether it was not the opinion of oil men that the trend of the oil lay between certain fields where the Poindexter land was; again, whether in the opinion of the witness the articles of literature in reference to the Poindexter Syndicate overestimated or overrated the value of such land; and again, whether it was not generally reported in oil circles that the "Jimmy" Cox well had come in and was producing oil and gas. Objections thereto were sustained.

Assignment 24 relates to the refusal of the court to permit witness Brown to testify to what J. D. Reynolds told him (which was clearly hearsay). It may be noted that defendant secured the advantage of this conversation, as Brown on cross-examination testified fully thereto.

Assignments 27, 28, 29, 30 and 31 refer to a transaction which occurred more than a year after the indictment was

returned, viz., the transfer of an oil lease in Texas to the "Jack Pot." This transaction was so far removed that it could throw no light on the question of intention at the time the alleged scheme to defraud set forth in the indictment was formulated and carried out, and was inadmissible.

Assignments 34 and 35 relate to the attempt to show certain options of oil leases claimed to have been obtained by one Jack Conway. Assignment 34 is entirely too indefinite to challenge attention. However the transactions of Conway referred to were in July, August and September, 1923, and relate to the effort to organize a new company, and not to the Jack Pot or the Poindexter Royalty Syndicate Companies. Even were the question properly preserved it is [fol. 482] apparent there was no error in the court's ruling excluding the evidence.

Assignments of Error 36 to 43 refer to the offered evidence and rejection thereof with relation to an attempt to formulate a new company to be known as the K. C. Petroleum Company. The purpose of the new formation was to raise money to finance production in the Smackover Oil field. There is controversy in the evidence as to whether the new plan bore any relationship to the "Jack Pot." Defendant strenuously contends that one of its purposes was to raise money to finance the Jack Pot. Defendant did testify that the K. C. Petroleum Company was an organization he was attempting to perfect for the purpose of rasing capital with which to carry on the operations of the Smackover Jack Pot. Again, he testifies that he was not going to raise money to finance the Jack Pot, but that he was raising money to finance production in the Smackover field. The Jack Pot at that time seems to have gone the way of these fly-by-night companies. Its money was completely exhausted. "Finis" had been written on its efforts. Of course, as defendant practically was the Jack Pot there was some relationship between the K. C. Petroleum Company and the Jack Pot. The whole transaction as to the K. C. Petroleum Company seems to have been an attempt entirely upon the part of the defendant to interest men in a new company, which, according to the evidence, met with little response. From an examination of the evidence it is ap-

parent that the new concern actually had nothing to do with the Jack Pot or the Poindexter Royalty Syndicate. There was no error in excluding the evidence of the alleged attempted formation of the new K. C. Petroleum Company. The contract of agreement and the subscription agreement attempted to be introduced in evidence are merely self-serving declarations.

Assignments 55 to 67 relate to the refusal of the court to give certain requested instructions. Some of these are not accurate statements of the law, or combine incorrect with correct statements in such manner that the court would not be warranted in giving them. The other requests applicable to the facts are fully covered by the instructions, and the court having given a correct statement of the law is not required to repeat it, in the words of counsel Ingram v. United States, 5 Fed. (2d) 940.

[fol. 483] We refer to some of the requested instructions. For instance, Assignment 55 is based upon the court's refusal to give Instruction No. 9 which refers to the burden being upon the government to prove the representations made by defendant were false. Assignment 56 refers to Requested Instruction No. 10 which bears on the question of reasonable doubt and the interest and good faith of defendant in making representations. Both of these matters are fully and fairly covered by the instructions of the court. Assignment No. 59 realates to Requested Instruction No. 14, which is as follows:

"If you find from the evidence that the defendant actually believed the representations made by him were true, and that the promises made by him would be fulfilled, however inaccurate or untrue such representations, and however incapable of performance such promises may be found by you to have been in fact, such belief constitutes a complete defense to the charges set forth in the indictment."

It is apparent that this instruction does not correctly state the law. Moore et al. v. United States, 2 Fed. (2d) 839; Slakoff v. United States, 8 Fed. (2d) 9.

Other requested instructions raise the question of conversion by the defendant. Conversion is not an element of

crime under Section 215 of the Penal Code. While there is an allegation of conversion in the indictment it was superfluous. The offense is the improper use of the mails in carrying out the alleged fraudulent scheme. Whitehead et al. v. United States, 245 Fed. 385; Wine v. United States, 260 Fed. 911; Calnay v. United States, 1 Fed. (2d) 926.

There is little to be gained from a reference to each of the requested instructions and the asignment of error based thereon. We have examined the various instructions requested and compared them with the charge given by the court, and are satisfied that where the requested instructions correctly state the law the matter was fully covered by the instructions of the court.

Assignments 19, and 48 to 54 inclusive, cover the court's refusal to direct a verdict upon motion of the defendant at the close of all the evidence. We have carefully read all the evidence offered in this case and are satisfied there was sufficient substantial evidence to prove the scheme as alleged in the indictment; that the representations were false and [fol. 484] known by defendant to be false or made with reckless disregard of the truth, and that the mails of the United States were freely used in carrying out the schemes and devices of defendant.

The vital question in the case is the wrongful intent of defendant. That was for the jury. The theory of the defense seems to be that because the business which defendant was promoting eventually might have been successful and there were opportunities in the oil business for great fortunes defendant was absolved from any false pretenses or fraudulent representations. Such would constitute a new and unsafe standard of business conduct.

In such a lengthy trial, with the volume of evidence offered and introduced, there is, of course, probability of some error. We have examined this record with the care that the importance of the case demands and are satisfied that the evidence was sufficient to sustain the charges in the five counts of the indictment upon which defendant was convicted; that there were no substantial errors in the admission of evidence, the refusal to admit offered testimony, the denial of requested instructions, or in the instructions

given, prejudicial to this defendant. The errors, if any, were of a minor nature.

The judgment of the trial court is affirmed.

Filed May 4, 1926.

[fols. 485-503] In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted]

Judgment—May 4, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Arkansas, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the Judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed without costs to either party in this Court.

It is further ordered that the defendant in the Court below, Robert David Kercheval, do surrender himself to the custody of the United States Marshal for the Western District of Arkansas, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

May 4, 1926.

[fols. 504-507] In United States Circuit Court of Appeals

Order Denying Petition for Rehearing—July 26, 1926

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Plaintiff in Error.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

[fol. 508] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI.—Filed November 29, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 509] IN SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed December 20, 1926

Ia is hereby stipulated by and between the undersigned counsel for petitioner and respondent in the above named cause that the following portions of the record shall be omitted from the record as docketed in the Supreme Court of the United States, remaining portions to be printed.

Omit Index.

Omit page A.

Omit Return to Writ, Page B.

Omit Demurrer, Page 20.

Omit last two paragraphs Page 21.

Omit pages 22-24 inclusive.

Omit first paragraph, page 25.

Omit Petition for Writ of Error, Pages 26-27.

Omit Assignments of Error, Nos. 1, 2, 3, 5, to 16 inclusive.

Omit 18-76 inclusive.

Omit pages 44, 45 down last paragraph page 46.

Omit testimony from Page 47 to page 199.

Omit page 199 down to "Mr. Shaver" 5th line from bottom.

Omit testimony page 201 to page 330.

Omit page 330 except 4, 5 and 6th lines.

Omit pages 331 to 388 paragraph beginning "Q. They have read"

Omit last seven lines page 407.

Omit 408 to 440 inclusive.

[fol. 510 & 511] Omit page 449 beginning "Gentlemen of Jury."

Omit pages 450 to 463 "Mr. Shaver."

Omit page 463 "Mr. Jones. Yes Sir," to end of page.

Omit pages 464 to 472 inclusive.

Omit pages 473, 474, 475.

Omit pages 485 to 503 inclusive.

Omit petition for Stay, pages 504 to 507 inclusive.

William E. Leahy, Wm. J. Hughes, Jr., Counsel for Petitioner. William D. Mitchell, Solicitor General.

OK. Wm. D. Whitney, Spec. Asst. to the Atty. Gen.

December 17, 1926.

[fol. 512] [File endorsement omitted]

(4038)

No. 705

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

ROBERT DAVID KERCHEVAL, otherwise called "BOB" KERCHEVAL, otherwise called "DAVE" KERCHEVAL, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION AND BRIEF IN SUPPORT THEREOF.

WILLIAM E. LEAHY,
WM. J. HUGHES, JR.,
Counsel for Petitioner.

GEORGE R. SMITH,
PAUL JONES,
PAUL JONES, JR.,
H. C. WADE,
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

Page

Petition:

Jurisdiction 2
Questions Presented 2
The Facts 3
Decision of the Circuit Court of Appeals. 8
Reasons for the Allowance of the Writ. 9

Brief:

The Decision in the Heim Case. 11
The Decision in the Heim Case is Correct on Principles 17
Most Pleas of Guilty Entered in Hope of Lighter Sentence 20
Action of Court Allowing Defendant to Change Plea Conclusive Determination Binding on Trial Judge 21
Record Shows Vividly Evil of Error Complained of 27
Conclusion 30

AUTHORITIES CITED.

Page

Brooks v. U. S., 146 Fed. 223.....30, 31
Brown v. U. S., 146 Fed. 218..... 31
Calnay v. U. S., 1 Fed. (2) 926..... 29
Com. v. Ervine, 8 Dana 30.....13, 14
Crawford v. U. S., 212 U. S. 183..... 14
Green v. State, 24 So. 537.....15, 18
Heath v. State, 214 Pac. 1091..... 16
Heim v. U. S., 47 App. D. C. 485....11, 13, 14, 15, 20, 26
Heim v. U. S., 247 U. S. 522..... 15
McBryde v. U. S., 7 Fed. (2d) 466.....23, 24
Miller v. U. S., 38 App. D. C. 361..... 14
Murray v. U. S., 288 Fed. 1008.....25, 26
People v. Cignarale, 17 N. E. 135..... 17
People v. McEwen, 2 N. Y. Cr. 307..... 17
People vs. Ryan, 82 Cal. 617; 23 Pac. 121..... 13
State v. Branner, 149 N. C. 559..... 18
State vs. Carta, 90 Conn. 79; 96 At. 411.....13, 15
State v. German, 54 Mo. 526; 14 Am. Rep. 481..12, 26
State v. Myers, 99 Mo. 107; 12 S. W. 516.....12, 16
U. S. v. Hess, 124 U. S. 483..... 30
U. S. v. Loring, 91 Fed. 881..... 29
Wan v. U. S., 266 U. S. 1.....21, 23, 24, 26
White v. State, 51 Ga. 285 17
Whitehead v. U. S., 245 Fed. 285 29
Wiborg v. U. S., 163 U. S. 632 14
Wine v. U. S., 260 Fed. 911..... 29

Miscellaneous:

Greenleaf on Evid., Sec. 65..... 31
Wharton Crim. Evidence, 10th Ed. 638..... 14
2 Ruling Case Law 112, Abbots Trial Brief 314. 14
8 Ruling Case Law 112, Abbots Triel Brief 314. 14
1 Wharton Crim. Ev. Sec. 146..... 30
Zoline Fed. Crim. Law & Procedure, Vol. 2, 1063 31

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No.——

ROBERT DAVID KERCHEVAL, otherwise called "BOB" KERCHEVAL, otherwise called "DAVE" KERCHEVAL, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Supreme Court of the United States:

The above named petitioner, Robert David Kercheval, prays for a Writ of Certiorari to review a judgment of the Circuit Court of Appeals for the Eighth Circuit in a cause entitled United States of America v. Robert David Kercheval, otherwise called "Bob" Kercheval, otherwise called "Dave" Kercheval.

Your petitioner was convicted by the District Court of the United States for the Western District of Arkansas of the crime of using the mails to defraud in violation of Sec. 215 R. S. and sentenced to serve

three years in the penitentiary. The conviction was affirmed by the Circuit Court of Appeals, a Petition for Rehearing being denied July 26, 1926.

Jurisdiction.

Under Sec. 240-A of the Judicial Code as amended by the Act of February 13, 1925, this Court has power to review on Certiorari a decision of the Circuit Court of Appeals affirming a conviction in a District Court of the United States.

Questions Presented

1. Where a defendant upon arraignment pleads guilty but later, with the permission of the Court, withdraws his plea of guilty and pleads not guilty, can the fact that he pleaded guilty be used as evidence against him?

In such a case, should not the trial court have declared a mistrial upon the opening statement by the prosecuting attorney that defendant had "once pleaded guilty"? In any event, was it not reversible error for the court to allow the prosecuting attorney to submit in evidence over objection of the defense a certified copy of the plea of guilty?

There is a conflict of decision in the Federal Courts on this question. The Court below held that such proceedings constituted no error.

The Court of Appeals of the District of Columbia in Heim v. United States, 47 App. D. C. 485, held directly the opposite. In that case the prosecution in the course of the trial proved that the defendant had pleaded guilty but later withdrew the plea. The Court of Appeals held this reversible error.

There is also a conflict of opinion on this point among the State Courts. In the case of State v. Myers, 99 Mo. 107, 12 S. W. 516, it was held reversible error.

In People v. Ryan, 82 Cal. 617, 23 Pac. 121, it was held reversible error.

In Heath v. State, 214 Pac. 1091 (Oklahoma, 1923), it was held reversible error.

In State v. Carta, 90 Conn. 79, a majority opinion held it no error. Two judges joined in a dissenting opinion, which was referred to by the court in the Heim case as "conclusive in its reasoning." But in the Heim case itself, one of the judges dissented. So it can be seen the question is not free from difficulty.

2. A further question: whether conversion must not be proved, where charged, upon an indictment charging use of the mails to defraud, is involved. There is a conflict of decision on this point as will be shown later.

The Facts

Defendant was charged with using the mails to defraud in violation of Sec. 215 Federal Penal Code, in that he made various false representations in the selling of oil stock. It was alleged that he organized the Poindexter Royalty Syndicate and the Smackover Jack Pot Syndicate ostensibly for the purpose of dealing in oil royalties and leases, and, in general, engaging in the oil business, whereas, in reality they were merely stock selling propositions. Various representations, alluring in their character, and alleged by the Government to be false and fraudulent, are alleged to have been made by defendant in attempting to sell stock through the mails. It was then alleged that defendant intended to and did convert to his own use the funds thus received for stock subscriptions.

There was no proof, however, that defendant had ever converted such funds to his own use. The Government held this to be unnecessary, regarding such allegations as mere surplusage. Defendant's counsel, however, maintained and still maintain that such allegations go to the heart of the offense charged; in any case once alleged, they must be proved.

When accused was arraigned he pleaded guilty, was convicted, and sentenced. Later he filed a Motion to set aside the conviction and sentence on the ground that he was led to plead guilty by promise of the prosecutor that he would be lightly punished. (R. 397) This Motion, after hearing, was granted by the Court with permission to accused to plead not guilty. Thereupon, he pleaded not guilty and was brought to trial. The prosecuting attorney in his opening statement, over objection, informed the jury to this effect. He stated that defendant had already pleaded guilty to the offense charged (R. 47) though he was now going to trial upon a plea of not guilty. Later on, in closing the Government's case, the prosecuting attorney submitted in evidence a certified copy of defendant's plea of guilty, to which defendant again objected (R. 199-200). The prosecuting attorney then proposed to introduce in evidence a certified copy of the judgment and sentence of the Court which had been entered upon the plea of guilty. (R. 200-201). Upon objection by defense and questioning by the Court as to the purpose for which the judgment and sentence was being introduced, the prosecuting attorney in the full hearing of the jury stated that his object was to show that the defendant did not attempt to withdraw his plea of guilty until after the judgment and sentence, and that the object of defendant's Motion was not really to

withdraw his plea of guilty but to secure a reduction of the sentence. (R. 200-201)

As already seen, not only did the government prove his plea of guilty, but wished to prove, and so far as the jury was concerned, might as well have proved, that defendant was actually convicted of the very offense for which he was on trial; not only convicted but sentenced. In addition, the prosecuting attorney seriously questioned defendant's motives in withdrawing his plea, conveying the impression that defendant was guilty of double dealing with the Court.

But the error is even more strikingly illustrated by what followed. It might be supposed that upon a plea of not guilty a defendant could commence his case ab initio; at least he would not be required by the Government to explain why he pleaded guilty and inferentially *why he now pleads not guilty*. For every man has a right to plead not guilty. But in the present case, the fact of defendant's plea of guilty having been proved, and his motives in so pleading and later pleading not guilty having been impugned, it was clearly up to the defendant to "explain." He was forced to do so by the Government. Bearing in mind always that the only true issues at his trial were his guilt or innocence, not why he pleaded guilty or why he pleaded not guilty or what sentence he hoped to get, the following facts were brought out, all absolutely irrelevant to the issue of guilt or innocence and all highly prejudicial to the defendant's substantial rights, viz.:

1. That defendant, as an inducement to plead guilty, was "offered" three months in jail and a fine of $1000. (R. 388)

2. That there was a clear understanding to this effect with Mr. Arterberry, Assistant United States At-

torney, and Mr. Ross, Post Office Inspector, and that defendant was to have two months to think it over. (R. 389)

3. That defendant, being on bail, went to New York, was returned to Texarkana, pleaded guilty and received a sentence of three years in the penitentiary and a fine of $500.00. (R. 389)

4. That later defendant asked to have his plea, and the judgment and sentence set aside; that the Court, after a hearing, duly set aside the plea, judgment and sentence, and permitted defendant to plead not guilty. (R. 390)

The Prosecuting Attorney in cross-examining the defendant submitted in evidence a certified copy of defendant's Motion to set aside the judgment and sentence. This document sets forth in substance what is referred to above, namely, that accused had an understanding with Prosecuting Attorney Arterberry, Special Prosecutor Shaver, and Post Office Inspector Ross, to the effect that if he pleaded guilty a recommendation of a fine of $1000.00 and three months in jail would be made. Defendant, after hearing this proposal, conveyed to him by the United States Marshal, interviewed Mr. Arterberry in an endeavor to get him to recommend a fine of $2500.00 and no imprisonment. Mr. Arterberry stated that he did not believe the court would accept such a recommendation but was positive that if he pleaded guilty the court would accept Mr. Arterberry's recommendation of a fine of $1000.00 and three months imprisonment. (R. 398) The defendant later went to New York, and because of illness was unable to return on February 12th, the date set for his plea. He wired the District Attorney that he was ill with pneumonia. The District Attorney, however, did

not wait for him to appear voluntarily but had him arrested in New York. (R 399).

On his return he saw District Attorney Langley, at which time Mr. Langley stated that he would not himself make any recommendation. Defendant stated that he did not understand this to mean that Mr. Arterberry would not make any recommendation. He stated explicitly that he relied on Mr. Arterberry to make his recommendation and would not have pleaded guilty unless he believed Mr. Arterberry would do as he promised. He was surprised and dumbfounded when upon his plea Mr. Arterberry made no statement but the court immediately sentenced him. (R. 400)

The prosecution, in cross examining defendant, admitted that at one time at least a promise was really extended to him provided he pleaded guilty. (R. 396) This was also admitted in the Government's response to defendant's Motion to set aside the judgment and sentence. (R. 403-404) The Government, however, contended that all such promises were withdrawn by District Attorney Langley. Defendant, however, repeatedly stated that it was not District Attorney Langley that he was relying upon but Mr. Arterberry. In any case, the question of whether defendant's plea of guilty was entered with the expectation that a recommendation would be made by Mr. Arterberry or after Mr. Langley had informed him that it would not be made, was a question for the Court to decide upon defendant's Motion to set aside the plea and sentence. It was not a question for the jury upon his plea of not guilty. The decision of the Court granting his Motion and setting aside the plea and judgment and sentence settled the point once for all.

The further cross-examination of defendant by the

prosecution found on pages 404 to 407 of the Record was likewise prejudicial, involving a statement by the Prosecuting Attorney to the effect that the Judge on hearing defendant's motion had stated that it was "a judicial farce not to put a man in jail when he got away with $21,000.00."

The Government also tried to pin the accused down to the admission that the same facts existed at the time of his trial as existed at the time he pleaded guilty, and that accused had full knowledge of those facts, all in an attempt to discredit him with the jury. (R. 405.

Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals in holding the admission of the plea of guilty was no error apparently bases its decision upon two grounds:

1. It could not have been error because it was left to the jury to decide whether the plea was voluntarily entered.

2. Because the defendant "knew better than anyone else whether or not he was guilty. Under the evidence in this case a plea of guilty upon his part would have seemed a very reasonable thing." (R. 481)

As to (1) above, it is obvious if this were true, no confession, however inadmissible, would ever constitute reversible error. As to (2), this simply begs the question. In effect the Circuit Court of Appeals says "The plea of guilty was admissible because you *were* guilty." But it is absurd to test the admissibility of a confession by whether or not it states the truth. This is altogether too simple a solution of the matter and hints at the possibility that the Circuit Court of Appeals never considered the point seriously. Its atten-

tion was not drawn to the Heim case and other cases in point until a petition for Rehearing was filed, and this Petition was promptly denied.

Reasons for the Allowance of the Writ

1. It is submitted the court should grant the petition herein prayed for if for no other reason than one of simple justice: It is evident on a reading of this record that the defendant was not given a fair trial. It is shocking to every man's sense of justice to think that upon a plea of not guilty a defendant should be hounded to the jury with the fact that he had already pleaded guilty and compelled to explain his plea of guilty and why he had withdrawn it and pleaded not guilty. It is obvious there is no possible explanation a defendant could make which would be a satisfactory reason to a jury for his previously having pleaded guilty to the offense charged. This itself shows how impossible a fair trial would be under these circumstances.

2. It should be important to this court to secure uniformity of decision on this point and resolve the clear conflict between the decision of the Circuit Court of Appeals in the present case and that of the Court of Appeals of the District of Columbia in the case of Heim vs. U. S. 47 App. D. C. 485.

3. It is to the advantage of the Government that pleas of guilty should be freely entered. The decision below will obviously deter defendants from entering such pleas if they must look forward to the possibility of their being used against them as full judicial confessions.

4. On the other hand, if it is proper that such pleas should be regarded as confessions and be capable of being used against defendants, it would be of great

value to the prosecuting officers of the Government to be able to use such pleas against defendants without fear of reversal by such Appellate Courts as might follow the Heim case.

5. The conflict of decision among the Federal Courts relative to the necessity of proof of conversion where alleged, should likewise be finally settled by this court.

For these reasons it is submitted that a Writ of Certiorari should be issued, and the question involved be determined by this Court.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said court to certify the above case to this court for review and determination as provided by law, and that your petitioner may have such other and further relief in the premises as to this court may seem appropriate.

ROBERT DAVID KERCHEVAL,

Petitioner.

WILLIAM E. LEAHY,
WM. J. HUGHES, JR.,
Counsel for Petitioner.

Certificate of Counsel

We hereby certify that we have carefully examined the record, and in the light of its contents consider the petition for a Writ of Certiorari well founded and that it is not interposed for purpose of delay.

WILLIAM E. LEAHY,
WM. J. HUGHES, JR.,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

I

The Decision in the Heim Case.

In the case of Heim v. U. S., 47 App. D. C. 485, the Court of Appeals for the District of Columbia had before it a prosecution for adultery, wherein, upon arraignment, defendant entered his plea of not guilty. Thereafter, when the case came on for trial, he was without counsel and asked leave of the Court to withdraw his plea of not guilty, and enter a plea of guilty, which was granted. Later defendant moved the Court to allow him to withdraw this plea of guilty and again enter a plea of not guilty. This was granted and he went to trial upon this plea of not guilty. In the course of the trial the Government proved, over objection of defense, the plea of guilty. This was the only assignment of error dealt with in the opinion.

The Court held, reversing, that confessions belong in two general classes, judicial and extra-judicial. A plea of guilty is a judicial confession. The objection of defense went to the admissibility of the confession. The Court said:

> "There is but a single question presented,—Is such an admission of guilt ever made under such circumstances as to make it competent evidence upon a trial under a substituted plea of not guilty?
>
> "A plea of guilty to an indictment is made under conditions of duress which require the utmost discretion in receiving it. A defendant should only be permtited to enter such a plea after being admonished by the court as to its consequences. When thus made, he waives the right to trial by jury, and solemnly confesses the truth of the charge made in the indictment.

"* * * The plea of guilty to an indictment amounts to a conviction. It is a conclusive confession of the truth of the charge; hence, the admission of such a plea in the trial under a substituted plea of not guilty, if the confession is to be given the legal inferences which render confessions as matter of law admissible, must logically be sufficient without corroboration to sustain a verdict of guilty. *Matthews* v. *State*, 55 Ala. 187, 22 Am. Rep. 698; *State* v. *German*, 54 Mo. 526, 14 Am. Rep. 481."

The Court stated that its attention had been invited to only three cases in this country where a plea of guilty had been used against a defendant who was later allowed to plead not guilty. It then reviewed the case of *State* v. *Myers*, 99 Mo. 107, 12 S. W. 516. There the defendant, upon a trial of murder, pleaded guilty in open court. The court refused to accept the plea which was not recorded and set the case for trial. At the trial the prosecution proved the fact that the defendant had previously pleaded guilty. In reversing, the Appellate Court held:

"Such testimony should not have been admitted. The confession being what is termed 'a plenary judicial confession,' that is, a confession made before a tribunal competent to try him, was sufficient whereon to found a conviction. 1 Roscoe, Crim. Ev. 8th ed. 40. Consequently, the trial court might have proceeded at once to pass sentence upon the accused * * * No one would contend that, if the plea of guilty had been entered of record, such plea could have been received in evidence against the defendant, and yet the same principle is involved whether the plea actually go upon record or not; in either case, it must, if received in evidence, be *conclusive* of the

> defendant's guilt * * * By refusing to receive the plea and granting the defendant *a trial*, this of necessity meant a trial with the issues of fact to be determined by the jury, and not to be determined by the previous plea of the defendant, which admitted all that the State desired to prove. In short, the trial court could not refuse to receive the defendant's plea of guilty at one time, and then use it against him at another."

In the second case referred to by the Court in Heim v. U. S., namely, *People* v. *Ryan*, 82 Cal. 617, 23 Pac. 121, the court reversed the conviction below upon the ground that the admission in evidence of the plea of guilty was reversible error. The court said :

> "Can it be that a privilege thus conceded to a defendant of *substituting* one plea for another is to have the inevitable effect of defeating the whole object of the 'substituted' plea?"

The third case discussed by the Court in Heim v. U. S. was the case of *State* v. *Carta*, 90 Conn. 79, L. R. A. 1916E, 634, 96 Atl. 411. This was the only case cited in favor of submitting in evidence a plea of guilty at the trial. Referring to this case, the Court of Appeals of the District of Columbia said:

> "Three judges announced the majority opinion, resting the decision upon the case of *Com.* v. *Ervine*, *8 Dana*. 30, a case of remote analogy, as we shall observe later. Two judges joined in a dissenting opinion, not only conclusive in its reasoning, but in which an overwhelming array of authority is marshaled."

The Court then went on to say that text writers were unanimous in condemnation of the practice, citing

Wharton Crim. Evidence, 10th Ed. 638; 2 Encyc. Pleading & Practice 779; 8 Ruling Case Law 112, Abbots Trial Brief 314, and pronounced the Ervine case, *supra,* to be only remotely analogous.

Referring to the instruction to the jury in the Heim case, which was somewhat similar to the instruction in the present case, the Court said:

> "Nor can the error be cured by an instruction of the court to the jury attempting to place a limitation upon the weight to be given evidence of such a confession. Its admission under any circumstances is such an invasion of the right of one accused of crime to a fair and impartial trial that the error is incurable. It is so destructive of the rights of the accused that the court will not stop to examine into the technical accuracy of the objection made to its admission, but will, in the furtherance of justice, take cognizance of the error and refuse to charge the defendant with any waiver of his rights through the oversight or neglect of his counsel to state with legal precision the grounds of his objection. *Wiborg* v. *United States*, 163 U. S. 632, 41 L. ed. 289, 16 Sup. Ct. Rep. 1127, 1197; *Crawford* v. *United States*, 212 U. S. 183, 194, 53 L. ed. 465, 470; 29 Sup. Ct. Rep. 260, 15 Ann. Cas. 392; *Miller* v. *United States*, 38 App. D. C. 361, 365, 40 L. R. A. (N.S.) 973."

As to the contention that the Ryan case should be distinguished for the reason that the withdrawal of the plea of guilty was due to statutory authority, the Court held that, if the plea of guilty was set aside, it mattered not from what source the authority to set it aside was derived. It said:

> "The authority for the act, so long as it existed, fixed the status of the defendant. After the plea

of guilty was withdrawn, the case was in precisely the same condition as if the plea of not guilty had been originally entered. The admission of guilt had disappeared from the case, because the court, in the exercise of its sound discretion, had determined that, in jusice, it should go out of the case. When it was stricken out, its evidential effect as a confession disappeared. To reinstate it in the form of evidence against defendant is to deprive him of any advantage gained by the withdrawal of the plea of guilty, and restore him to a position where inevitable conviction awaited him at the hands of the jury. As was said in the dissenting opinion in the *Carta Case, 90 Conn.* 79, L. R. A. 1916E 634, 96 Atl. 411: 'Considerations of fairness would seem to forbid a court permitting for cause a plea to be withdrawn for cause, and at the next moment allowing the fact of the plea having been made to be admitted in evidence with all its injurious consequences, as an admission or confession of guilt by the accused. The withdrawal is permitted because the plea was originally improperly entered. No untoward judicial effect should result from the judicial rectification of a judicial wrong.'

"The judgment is reversed, and the cause remanded for a new trial."

The Supreme Court of the United States refused to disturb this decision when it denied the Government's petition for a writ of certiorari. 247 U. S. 522, 22 L. ed. 1247 (Memo.).

Of like importance: *Green* v. *State,* 24 So. 537 (Fla.), wherein the Court said:

> "The authorities cited by counsel on this ground sustain the view that when an accused first pleads guilty to a charge, and afterwards, by permission of the court, is allowed to withdraw

such plea, and put in the general issue, the plea of confession allowed to be withdrawn cannot be put in evidence on the trial."

State v. *Myers*, *12 S. W.* 516 (Mo.), wherein the Court held:

"Evidence that defendant pleaded guilty at a former term of court, which plea the court refused to receive, is inadmissible, and does not require a special objection"; and

Heath v. State, 214 Pac. 1091 (Okla. 1923), in which the Court decided that:

"A withdrawn plea of guilty, for which a plea of not guilty is substituted by authority of court, is not admissible in evidence against the defendant."

In this last case the facts are almost identical with those herein. There the defendant had pleaded guilty and had been sentenced. Later counsel moved to be allowed to withdraw the plea and to set aside the judgment. The motion was granted; the judgment was set aside, defendant's plea of guilty was allowed to be withdrawn, and a plea of not guilty substituted. At the trial, the Court, over defendant's objection, permitted the State to introduce in evidence the record showing a plea of guilty and the judgment thereon. After the trial and conviction, the District Attorney filed a confession of error on the ground that the trial court committed prejudicial error in permitting the prosecution to introduce the plea of guilty which had been withdrawn. Reviewing this confession of error, the Court said:

> "Upon a plea of guilty, no trial upon the question of the defendant's guilt can be had. His plea stands in the place of the verdict of a jury finding him guilty, and for this reason we think that a withdrawn plea of guilty, for which, by authority of law and of the court a plea of not guilty is substituted, would not be admissible in evidence against the defendant as a confession nor as an admission against interest. In our opinion, the rule supported by reason and authority is that a withdrawn plea of guilty, for which a plea of not guilty is substituted by authority of court, is not admissible in evidence against the defendant."

The decisions above cited have been recognized, in effect, in two other courts. In *White* v. *State*, 51 Ga. 285, the Court stated that, if a plea of guilty has been withdrawn by permission and a plea of not guilty substituted, it follows that the plea of guilty simply goes for nothing. In *People* v. *Cignarale*, 17 N. E. 135 (N. Y. Ct. of Appeals), the court held that the withdrawal of a plea left the case without any plea whatever and that the plea thus withdrawn left no legal consequences of any sort or description.

II

The Decision in the Heim Case Is Correct on Principle

It is submitted that upon principle the rulings above referred to are correct. A plea of guilty is a confession of guilt and is equivalent to a conviction. (*16 C. J. 402.*)

> "After a plea of guilty there is nothing further for a court to do than to pronounce sentence. A plea of guilty is like the verdict of the jury. There is no duty of the court to 'convict,' but only to sentence." *People* v. *McEwen*, 2 N. Y. Cr. 307.

> "A plea of guilty is not only an admission of guilt, but is a formal confession of guilt before the court in which the defendant is arraigned. It is, in this respect, altogether different from a full and voluntary confession, formally made before a magistrate or some other person. The latter is merely evidence of guilt. *State* v. *Branner*, 149 N. C. 559, 562, 63 S. E. 169.
>
> "Where the statute permits the plea of guilty and such a plea is accepted and entered by the court in a criminal case, it is the highest kind of conviction of which the case admits. *Green* v. *U. S.*, 40 App. D. C. 46, L. R. A. (N. S.) 1117.

A plea of guilty, therefore, stands upon an entirely different plane from any other confession, either judicial or extra judicial. It is not evidence like any other confession, tending merely to prove the charge, but it is a conviction itself. Assume that upon the retrial of a defendant who had been tried and convicted but whose conviction an appellate court had reversed, the Goverment opened the case by announcing to the jury that the accused had already been convicted in that very case, as the Government opened this case in the lower Court by announcing that the defendant had already pleaded guilty, would one contend such a statement proper? If uttered, how long would an appellate court attempt to weigh or determine the effect of the prejudicial error thus patently committed. A plea of guilty is more than a confession. That aspect of the plea is merged in its other aspect, that of a judicial act, *i. e.*, a conviction. In other words, a plea of guilty is just as much a judicial determination of the guilt of an accused as a conviction by a jury. If, therefore, when a conviction is set aside and defendant goes to trial anew, it would obviously be reversible error of

the most flagrant type for the Government to prove the previous trial and conviction, upon what reasoning can the course be defended which the Government pursued in this case? Is the error in the latter less prejudicial than in the former instance? Upon what ground can it be defended?

From another viewpoint, also, a plea of guilty should always be regarded as inadmissible. There is something inherently shocking to our sense of fairness in the prosecution's entering upon the trial of a case, wherein the accused is presumed by law to be not guilty until proved guilty beyond a reasonable doubt, by announcing to the jury that the accused has already actually pleaded guilty, not to another or similar crime, but to the identical offense for which the jury is about to try him. Far fetched legal analogies as to the *right* of the prosecution to use the plea of guilty thus withdrawn, viewing it merely as a confession, should not outweigh this fundamental common sense consideration. The foundation of our criminal law is that the accused should be entitled to a *fair trial.* This should mean a trial upon the facts uninfluenced by any reference to previous acts of the defendant the effect of which the court has once destroyed. The case should go to the jury upon its merits and the evidence then presented, not upon the judicial act of the defendant in once pleading guilty,—an act the Court determined, by permitting its withdrawal, to have been either a mistake, an error of judgment, or an act in its nature involuntary, resulting from hope or fear.

III

It Is Common Knowledge That Most Pleas of Guilty Are Entered in the Hope That a Lighter Sentence May Be Awarded

It will be noted that in the Heim case, the Court gravely questioned whether a plea of guilty, later withdrawn, is ever made under such circumstances as to make it competent evidence. The Court said that a plea of guilty is made under such conditions of duress as to require the utmost discretion in receiving it. The Supreme Court of the United States as far back as Bram v. United States held such duress might consist in either hope or fear (*Bram* v. *United States*, 168 U. S 532). Even without any direct testimony from defendant to that effect, judges and lawyers are all alike aware that most pleas of guilty are usually entered, not as the spontaneous act of the defendant, but with the distinct hope that he may be dealt with more leniently. This hope is founded often upon a direct understanding with the prosecution. This is the foundation of that universal rule which allows a defendant, upon pleading guilty, later to withdraw his plea, if he so desires, and to substitute in lieu thereof his plea of not guilty.

> "The court ordinarily will permit the plea of guilty to be withdrawn if it fairly appears that the defendant was in ignorance of his rights and of the consequences of his act or was influenced unduly and improperly either by hope or fear, in the making of it, or if it appears that the plea was entered under some mistake or misapprehension." (*16 C. J. 398.*)

Such pleas are so frequently entered upon advice of counsel and for other reason influencing the defendant that it is recognized they are often not voluntary within the meaning of the law.

IV.

The action of the court in allowing defendant to change his plea from guilty to not guilty is a conclusive determination that the plea was not voluntary and this determination is binding upon the trial judge.

Where a court allows such a plea to be withdrawn, its action conclusively establishes the fact that the plea was, initially, involuntary. Otherwise the Court's action is reduced to an absurdity. Certainly if a court were convinced that the plea was strictly voluntary and entered with a full understanding of its nature it would never allow the accused to withdraw his plea at all. It would not do so through mere caprice. The Court is not compelled by law to allow him to change his plea and numerous authorities may be cited for this proposition. *16 C. J. 397*, note 6; page 398 (Note 12.) If, therefore, a court has granted a defendant's motion to withdraw his plea of guilty, it must have found that the plea was in some sense involuntary, *i. e.*, induced by hope or fear. If it was involuntary, it is inadmissible even as a confession. The latest definition by the Supreme Court of a voluntary confession is in the Wan case, that "a confession is voluntary in law if, and only if, it was in fact voluntarily made." (*Wan v. United States*, 266 U. S. 1, 14.) When, therefore, the court has permitted a defendant to withdraw his plea of guilty, therefore made, a conclusive presumption should and does result that such plea was involuntarily entered, within the meaning of the law. This ought to and does render the question of its voluntary character and its admissibility against the defendant later *res adjudicata* for the entire case. This is the only logical result which can flow from

the action of the Court when it allows it to be withdrawn. (See *6 A. L. R. 687.*)

And as to its discretion and right to deny a request to change such a plea, see *6 A. L. R. 687; 20 A. L. R. 1441;* also *Annotations 1926 Supplement A. L. R. 243.*

The error committed by the trial court and inadvertently affirmed by this court is clear upon an inspection of this record. Throughout, the plea of guilty has been treated as an ordinary *extra-judicial* confession, and the law and the practice in determining admissibility of the latter erroneously applied to the admission of the plea. The distinction between the two is plain and of the most vital importance to the defendant, as hereinbefore pointed out. Thus, the trial court instructed the jury that:

> "The plea of guilty is introduced as evidenced by the Government. You are to take that into consideration, that is, you will take it into consideration upon a certain condition. If you find that Mr. Kercheval made that plea of guilty and no promise was held out to him for the purpose of getting him to make that plea, or if you find that he was notified before he made the plea that nothing that was ever said to him with reference to it theretofore would be met, then it is evidence for you to consider in connection with the other evidence in the case. If you find out however that he was included, and you are to take all the facts and circumstances into consideration—you are to take Mr. Kercheval's intelligence into consideration in connection with whether or not he could be deceived in a matter of that kind. I say if you find that he was deceived; that this was brought about by conversations that he had had with reference to it, and that he made that plea of guilty when as a matter of fact he was not guilty, then you will disregard that particular

part of it and consider just the other testimony in the case."

This court in its opinion sustaining that portion of the charge says:

"While there was evidence of defendant that some promise had been made him by a Special Assistant District Attorney, Mr. Arterberry, as to punishment in case he pleaded guilty, the evidence of the District Attorney shows that defendant was fully informed by him before the plea that if he did plead guilty it would be upon his own volition and that no promises whatever would be made to him. It is true in the federal courts, as stated in Ziang Sung Wan v. United States, 266 Fed. 1, 14, that 'the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made.' There is no claim here of any compulsion applied to defendant. The court left it to the jury as to whether the plea of guilty was voluntary or made under some kind of a promise held out to him by which he was deceived. If the latter it was to be entirely disregarded. Certainly this was all defendant could claim under the facts of this record. McBryde vs. United States, 7 Fed. (2d) 466. In the motion made by defendant to set aside the judgment he admits that he had pleaded guilty. The purpose was to reduce the punishment, but if this failed he asked to withdraw his plea, and that the judgment be set aside. We know of no reason why the plea of guilty was not admissible under all these circumstances for what it might be worth. It was not conclusive of guilty and the court so instructed the jury. The defendant probably knew better than anyone else whether or not he was guilty. Under the evidence in this case a plea of guilty

upon his part would have seemed a very reasonable thing. We see no substantial or prejudicial error in the admission of any of the evidence complained of."

Thus, both at *nisi prius* and on writ of error, the law which directed the jury in its deliberations and sustained the trial judge in his charge was the law which governs the admissibility of *extra judicial* confessions, not *judicial* confessions in the form of a plea of guilty which in itself is in effect a conviction, not merely evidence for the consideration of the jury in proving a conviction. This is clearly pointed out in Heim vs. United States, *supra*. McBryde vs. United States, 7th Fed. (2d) 466, relied upon by this Court in its opinion, is authority only in reference to *extra judicial* confessions. Two of the four cases quoted as authority by the court in McBryde vs. United States originated in the District of Columbia, resulting the one in a reversal in the Supreme Court of the United States and the other in merely following the settled law of the District of Columbia and Federal Courts generally in regard to the admissibility of *extra judicial* confessions. That the jury should not always be allowed to consider even an *extra judicial* confession upon instruction as to the law in reference thereto, is established by the reversal of the Court of Appeals of the District of Columbia in the Wan case, *supra*. In that case the trial judge thought it proper to follow the settled practice and permit Wan's confession to go to the jury under the law governing its admissibility as given the jury by the court. In that case also there was conflict in the evidence surrounding the making of the confession, a sharp and serious conflict. The presiding justice believed it the duty of the

jury to solve that conflict and to consider or reject the confession according to their determination of the truth of the circumstances under which it was made—a practice hazardous for the accused at best where there is any substantial evidence that the confession was made under circumstances rendering its character involuntary. In reversing, the Supreme Court unanimously held that, regarding that confession, notwithstanding the conflict in testimony, as matter of law the confession was involuntary and the trial judge should have refused to permit it in evidence before the jury. Wan has been retried twice since. In neither trial did the prosecution attempt to introduce that confession. The evidence was carefully and strictly limited. The line to which the testimony might approach was marked sharply and nicely. The court was diligent to protect Wan from any reference to his former confession. The jury neither knew nor heard anything of it. It was as if the confession had never been made. In the instant case the court had once concluded the plea of guilty was entered under such circumstances that, upon application for leave to withdraw the same, the plea was withdrawn and another substituted in its place. That determination, allowing the motion to withdraw, concluded just as finally the questions improperly raised at this defendant's trial to his disadvantage as the decision of the Supreme Court finally settled all reference to the confession of Wan.

In Murray vs. United States, 288 Fed. 1008, 1013, 53 Ap. D. C. 119, the Court of Appeals of the District of Columbia merely announced the familiar principle of law applicable to the admissibility of *extra judicial* confessions whenever their admission in evidence at

the trial is attacked upon appeal. Both the Wan and the Murray cases, therefore, are authority only for confessions made outside the forum of the court and in no way relate to the right of the prosecution to introduce in evidence against the defendant a plea of guilty made in the solemnity of a judicial proceeding, but later withdrawn by leave of the same tribunal after motion made and hearing had thereon. The same court which considered both the Wan and the Murray cases is the only Federal Court, so far as the diligence of counsel can discover, which has had before it the decision of the admissibility in evidence against the defendant of both *extra judicial confessions* and a *plea of guilty entered but withdrawn by leave of court*. The great weight of State authority is with the opinion in Heim vs. United States, *supra*. Of the distinction between the two the Court of Appeals of the District of Columbia says:

> "We are not here concerned with the rules which govern the admissibility of extra judicial confessions or judicial confessions made before a committing magistrate, which stand upon an entirely different plane from the grade of judicial confessions we are here considering. The plea of guilty to an indictment amounts to a conviction. It is a conclusive confession of the truth of the charge; hence, the admission of such a plea in the trial under a substituted plea of not guilty if the confession is to be given the legal inferences which render confessions as matter of law admissible, must logically be sufficient without corroboration to sustain a verdict of guilty. Matthews v. State, 55 Ala. 187, 28 Am. Rep. 698; State v. German, 54 Mo. 625, 14 Am. Rep. 481."
>
> (Heim v. United States, 47 App. D. C. 485, 488, 489.)

Thus, the reasoning of both the tiral court in this case and of this Court in its opinion becomes inapplicable. We are no longer concerned with the reasons impelling this defendant's plea in the first instance, his motives or his hopes in making the same. They are not for consideration. They were properly for the determination of the judge who heard and passed on the motion for leave to withdraw. Such questions as whether Mr. Langley informed the defendant no promises would be extended him in the event he pleaded guilty or whether the defendant relied on Mr. Arterberry's assurance, which were commented upon by this Court, were for the attention of that judge upon the hearing of the application to withdraw. Once he determined the plea ought to be withdrawn, that ended all inquiry into those matters, and neither another trial judge or any jury could sit upon his decision by way of review either to correct the same, listen to a reargument of that motion for leave to withdraw or determine the truth of defendant's contention that, when he entered his plea, he did so through hope, fear, or any other influence which rendered it of an involuntary character.

V.

The record in the present case shows vividly the evil of the error complained of.

The astounding consequence to the defendant which can flow from attempting to introduce in evidence his formal plea of guilty withdrawn by leave of court is evidenced by what transpired in this case when the attempt to introduce this plea was made. The error committed was particularly flagrant for the reason that the government opened its case to the jury by stat-

ing that the defendant had previously pleaded guilty (Rec. p. 47.) It later submitted in evidence a certified copy of that plea (Rec. pp. 199-200). It then attempted to submit the judgment of conviction entered up on the plea thus made (Rec. pp. 200-201). Upon objection as to the competency of the entry of that judgment, the prosecuting attorney, in the presence of the jury, stated that its purpose was:

> "Nothing further than to show that the plea was not attempted to be withdrawn until after judgment and sentence was pronounced. And then, when it was set aside further we can show, and will show, if necessary, that after judgment a motion was filed by defendant not to set aside the plea of guilty. He did not ask for that in the motion, but admitted in the motion that the plea had been entered and asked for the sentence to be reduced. However, we will not offer this at this time."

What situation can possibly be imagined more prejudicial to the interests of a defendant entitled to a fair and impartial trial than this, wherein the prosecuting officer first proves the plea of guilty once entered but later withdrawn and then impugns and attacks the motives of the defendant and his reasons for withdrawing it. Those motives and reasons were properly for the consideration of neither the prosecuting officer nor the jury. The court had passed upon them once. Having found the reasons sufficient and the motives proper, the act of withdrawal was no longer the subject of attack by the prosecution as the act of the defendant. If the subject of comment at all, it could be attacked only as the error of the judge.

With the fact of his plea proved against him and his motives and reasons for withdrawing the same as-

sailed, over his objection and exception, the defendant was then driven in his own case to explain the circumstances surrounding his entering the plea. The record (pages 388 to 407) is filled with examination and cross-examination of the defendant regarding conversations had, promises extended, assurances made, hopes raised, and then contrary statements in reference to all of these, all to the most serious damage of the defendant and all made necessary by the initial error made by the court in permitting the plea to be introduced at all after the court had once permitted it to be withdrawn. It is difficult to imagine how more prejudicial error could be committed against a defendant.

VI.

There is a conflict of decision among the Federal Courts as to the necessity of proving conversion where alleged in an indictment charging misuse of the mails in violation of Section 215, Penal Code.

The Court below held that conversion is not an element of the crime of using the mails to defraud in violation of Section 215, Penal Code, and that an allegation to that effect in the indictment was superfluous. (R. 483) The court cited Whitehead, *et al.*, v. U. S. 245 Fed. 385; Wine v. United States, 260 Fed. 911; Calnay v. United States, 1 Fed. (2) 926.

This decision of the Court below is in conflict with the decision of the Court in Moffatt v. U. S. 232 Fed. 523, holding substantially that conversion where charged was an element of the offense.

In the case of U. S. v. Loring, 91 Fed. 881, the Court held squarely that intent to convert the money re-

ceived through the mails to defendant's own use was the necessary part of the scheme to defraud.

Whether or not conversion is necessary in charging an offense under Sec. 215, Penal Code, the position of defendant's counsel is that the allegation having been made it must be proved.

In the case of Brooks v. U. S., 146 Fed. 223, the Court held that in charging an offense against Sec. 215, Penal Code, it was necessary that the particulars of the scheme being matters of substance should be alleged and should be set forth with sufficient certainty to acquaint the accused with what he was required to meet.

In the case of U. S. v. Hess, 124 U. S. 483, the Court said:

> "The essential requirements, indeed, all the particulars constituting the offense of devising a scheme to defraud, are wanting. Such particulars are matters of substance and not of form, and their omission is not aided or cured by verdict."

In the present case there can be no doubt that the allegation that the accused converted the money received to his own use was an essential part of the offense charged; certainly it was alleged in all six counts of the indictment. Having been alleged, it was necessary to be proved. The rule as stated by Wharton, is as follows:

> "Where there is an allegation which described, defines, qualifies or limits a material matter to be charged, it is taken as a descriptive averment, and the general rule obtains that it must be proved as laid, even though such particularity of description was unnecessary." (1 Wharton Crim. Ev. Sec. 146.)

In Zolines Fed. Crim. Law and Procedure, Vol. 2, 1063, under heading of Indictment for Use of Mails to Defraud, it is said:

> "The purpose of requiring a description of the scheme to defraud is to definitely and clearly inform the accused of the scheme charged against him so as to enable him to make his defense. It follows that one must be convicted, if convicted at all, on the scheme as alleged and if the scheme as alleged is not substantially established by the proof, he cannot be convicted."

Greenleaf on Evidence (14th Ed.), Sec. 65, says:

> "But where a person or thing, necessary to be mentioned in an indictment, is described with unnecessary particularity, all the circumstances of the description must be proved, for they are all essential to the identity."

As the Court said in Brown v. U. S. 146 Fed. 218, affirming the principle in the Brooks case, *supra*:

> "It follows that one must be convicted, if at all, on the scheme as alleged, and if the scheme as alleged is not substantially established by the proof, he cannot be convicted."

VII.

The petition for the Writ of Certiorari should be granted.

Respectfully submitted,
WILLIAM E. LEAHY,
WM. J. HUGHES, JR.,
Counsel for Petitioner.

GEORGE R. SMITH,
PAUL JONES,
PAUL JONES, JR.,
H. C. WADE,
Of Counsel.

To WILLIAM B. MITCHELL,
Solicitor General of the United States.

Please take notice that we will file in the office of the Clerk of the Supreme Court of the United States the foregoing petition for a Writ of Certiorari and Brief, together with the printed Record of the above entitled cause, and that on the .... day of November, 1926, we will submit the Petition to the Court.

WILLIAM E. LEAHY,
WM. J. HUGHES, JR.

Received a copy of the foregoing notice of the Petition for a Writ of Certiorari and the Brief referred to therein, this ——— day of October, 1926.

.....
Solicitor General of the United States.

No. 705.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

ROBERT DAVID KERCHEVAL, otherwise called "BOB" KERCHEVAL, otherwise called "DAVE" KERCHEVAL, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

WILLIAM E. LEAHY,
WM. J. HUGHES, JR.,
Counsel for Petitioner.

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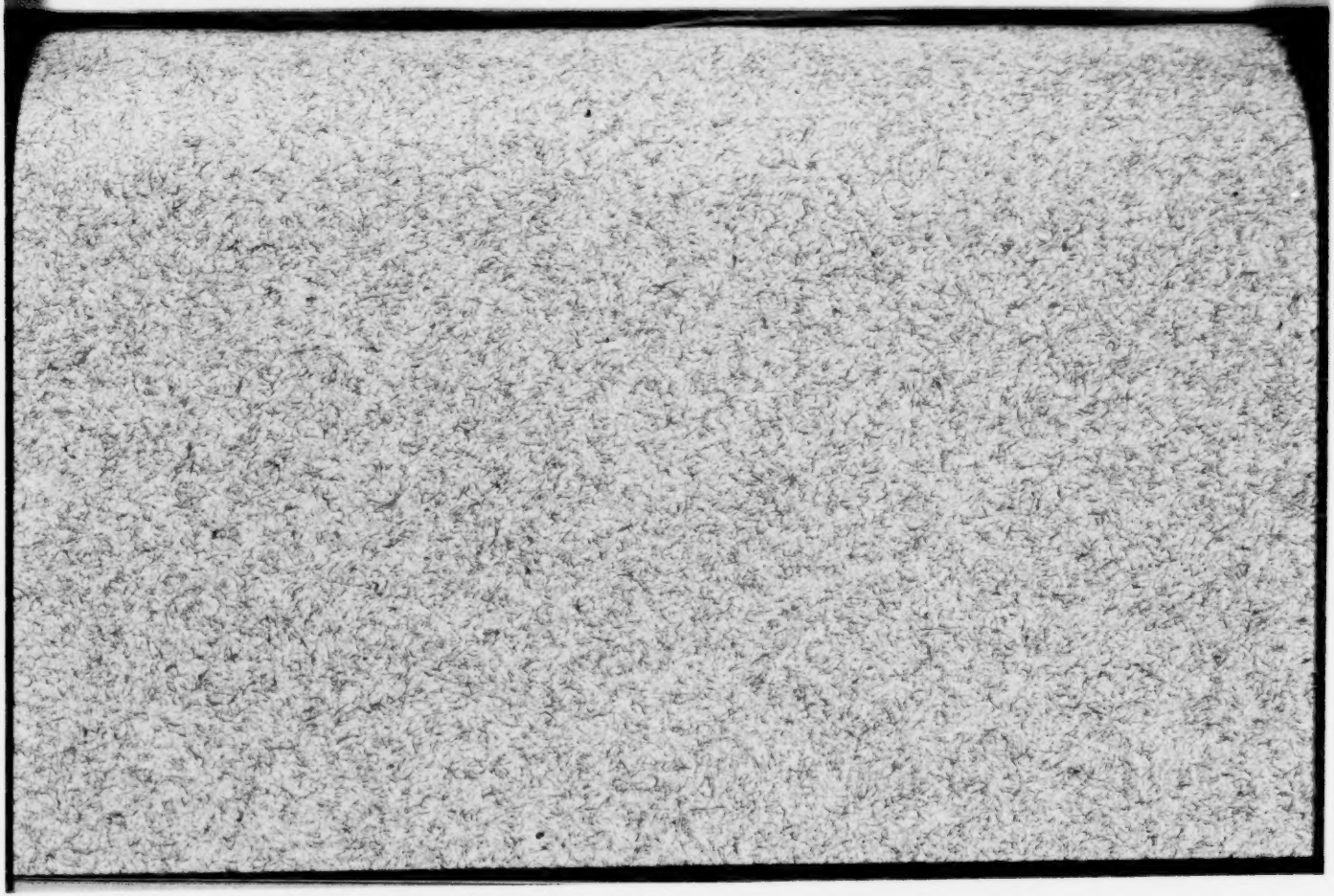

INDEX

	Page
Opinion of the Court Below	1
Jurisdiction	2
Statement	2
Summary of Argument	7
Argument:	
1. Error Prejudicial as held in Heim case	7
2. Heim case Correct in Principle	15
3. Pleas of Guilty Frequently Entered by Agreement	17
4. Action of Trial Court Setting Aside Plea Conclusive	20
5. Reasons Given by C. C. A. Inconclusive	27
6. Record Shows Vividly Error Complained of.	27
7. Court Should Not Affirm on Theory Trial Court Erred in Setting Aside Plea	30
8. Dissenting Opinion in Heim Case Discussed.	31
9. History of Law of Arraignments	31
10. Sec. 860 R. S. Not Applicable and Hence Repeal Not Pertinent	38
11. Carta Case for Government, Wrong in Principle	41
12. Probable Reasons For Admission of Confessions Before Magistrates	43

AUTHORITIES CITED

Statutes

	Page
Sec. 860 R. S.	38-41
Act. May 7, 1910, 36 Stat. 352	39-40
Stat. 7 Wm. 3d. C. 3	35
Stat. 1 Phil. & Mary C. 13	43-44
203 Phil & Mary C. 10	43-44
7 Geo. IV. C. 64	44
12 Geo. III-C-30	34

Cases

Bram v. U. S., 168 U. S. 532	18
Com. v. Ervine, 8 Dana 30	9
Crawford v. U. S., 212 U. S.	11
Gardner v. People, 106 Ill. 76	21
Green v. State, 24 So. 537	12
Green v. U. S., 40 Ap. D. C. 46	16
Heath v. State, 214 Pac. 1091	13-14
Heim v. U. S., 47 App. D. C. 485	7-12-26-31
Heim v. U. S., 247 U. S. 522	12
McBryde v. U. S., 7 Fed. (2) 466	23-24
Miller v. U. S., 38 App. D. C. 361	11
Murray v. U. S., 288 Fed. 1008	25
People v. Arkins, 33 Chi. Legal News 192	14, 21
People v. Cignarale, 17 N. E. 135	15
People v. Lenox, 67 Cal. 113	21
People v. McEwen, 2 N. Y. Cr. 307	15
People v. Ryan, 82 Cal. 617; 23 Pac. 121	10
Reg. v. Sell, 9 Car. & P. 346	21
Saunders v. State, 85 Ind. 318	21
State v. Branner, 149 N. C. 559	16
State v. Calhoun, 50 Kans. 523	21
State v. Carta, 90 Conn. 79; 96 At. 411	10, 41
State v. German, 54 Mo. 526; 14 Am. Rep. 481	26
State v. Kring, 71 Mo. 551	20
State v. Myers, 99 Mo. 107; 12 S.W. 516	9, 12

Page

State v. Stephens, 71 Mo. 535 20-21
Wan v. U. S., 266 U. S. 1 21-24
White v. State, 51 Ga. 285 15
Wiborg v. U. S., 163 U. S. 632 11

Miscellaneous

Abbotts—Estoppel 24 19
Bac. Abr. Evid. 45
Blackstone 4 Com. 324, 329 35
Burns, 1 Jurisprudence 867 ..... 19, 45
Chitty 1, Crim. L. 86 45
Chitty, 1 Crim. Law 428, 429 ..... 18, 19, 20, 36
Cokes, 3 Institute 558 34
Congressional Globe, 80, p. 845 39
Congressional Globe, 80, pp. 950-951 40
Congress. Record Vol. 45. pages 2251-2; 5764-5. 40
16 Corp. J. 398 18
Dick's Jurisprudence 45
Farresly 40 19
Hale, 2, Pleas of Crown 225 ..... 15, 19-32
14 Harvard Law Review 609 14
2 Hawk. Pleas Crown Ch. 46, Sec. 35 ..... 15, 45
Hawkins 2 Pleas of Crown, 466, 467 18-33-34
House Report 266 40
Lambard b. 4, c. 9 19
Pollock & Maitland 36
Report Atty. Gen. 1909 40-41
Senate Report 502 40
1 Starkie 242 45
Staundford, Pleas of Crown C. 51 32
Stephen 4 Com. 329, 331 35
Wharton Crim. Evidence, 10th. Ed. 638 10
1 Wharton Crim. Ev. Sec. 146 10
Wigmore 1 Ev. Sec. 817 43-46
Yearbooks 9 Henry 6, 60 19
Yearbooks 11 Henry IV. 65 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 705.

ROBERT DAVID KERCHEVAL, otherwise called "BOB" KERCHEVAL, otherwise called "DAVE" KERCHEVAL, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF PETITIONER.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals may be found at page 70 of the Record. It is reported in 12 F. (2nd) 904.

Jurisdiction of This Court.

The judgment of the Court below affirming the judgment of the District Court was rendered May 4, 1926 (R. 79) A petition for rehearing was filed and entertained, but denied on July 26, 1926. (R. 79). On October 26, 1926, petitioner applied to this Court for a Writ of Certiorari under Section 240-A, Judicial Code, as amended by the Act of February 13, 1925 (C. 229, 43 Stat. 936, 938). The Writ was granted November 22, 1926.

Question Presented.

1. Where a defendant upon arraignment pleads guilty but later, with the permission of the Court, withdraws his plea of guilty and pleads not guilty, can the fact that he pleaded guilty be used as evidence against him?

In such a case, should not the trial court have declared a mistrial upon the opening statement by the prosecuting attorney that defendant had "once pleaded guilty"? In any event, was it not reversible error for the court to allow the prosecuting attorney to submit in evidence over objection of the defense a certified copy of the plea of guilty?

Statement.

Defendant was charged with using the mails to defraud in violation of Sec. 215 Federal Penal Code, in that he made various false representations in the selling of oil stock. It was alleged that he organized the Poindexter Royalty Syndicate and the Smackover Jack Pot Syndicate ostensibly for the purpose of dealing in oil royalties and leases, and, in general, engaging in the oil business, whereas, it was claimed in reality they

were merely stock selling propositions. Various representations, alluring in their character, and alleged by the Government to be false and fraudulent, are alleged to have been made by defendant in attempting to sell stock through the mails (R. 2-15).

When accused was arraigned he pleaded guilty, was convicted, and sentenced (R. 30, 34, 43-44). Later he filed a Motion to set aside the conviction and sentence on the ground that he was led to plead guilty by a promise of the prosecutor that he would be lightly punished. (R. 43) This Motion, after hearing, was granted by the Court with permission to accused to plead not guilty. Thereupon, he pleaded not guilty and was brought to trial (R. 34). The prosecuting attorney in his opening statement, over objection, informed the jury to this effect. He stated that defendant had already pleaded guilty to the offense charged (R. 29) though he was now going to trial upon a plea of not guilty. Later on, in closing the Government's case, the prosecuting attorney submitted in evidence a certified copy of defendant's plea of guilty, to which defendant again objected. (R. 31) The prosecuting attorney then proposed to introduce in evidence a certified copy of the judgment and sentence which had been entered upon the plea of guilty. Upon objection by defense and questioning by the Court as to the purpose for which the judgment and sentence was being introduced, the prosecuting attorney stated that his object was to show that the defendant did not attempt to withdraw his plea of guilty until after the judgment and sentence, and that the object of defendant's Motion was not really to withdraw his plea of guilty but to secure a reduction of the sentence. (R. 31) No matter what the object of the motion an examination of its contents shows that therein the defendant, by affidavit,

asserts his essential innocence of the offense charged. (R. 48-50)

As already seen, not only did the government prove his plea of guilty, but wished to prove, and so far as the jury was concerned, might as well have proved, that defendant was actually convicted of the very offense for which he was on trial; not only convicted but sentenced. In addition, the prosecuting attorney seriously questioned defendant's motives in withdrawing his plea, conveying the impression that defendant was guilty of double dealing with the Court.

But the error is even more strikingly illustrated by what followed. It might be supposed that upon a plea of not guilty a defendant could commence his case *ab initio;* at least he would not be required by the Government to explain why he pleaded guilty and inferentially *why he now pleads not guilty.* For every man has a right to plead not guilty. But in the present case, the fact of defendant's plea of guilty having been proved, and his motives in so pleading and later pleading not guilty having been impugned, it was clearly up to the defendant to "explain." He was forced to do so by the error complained of. Bearing in mind always that the only true issues at his trial were his guilt or innocence, not why he pleaded guilty or why he pleaded not guilty or what sentence he hoped to get, the following facts were brought out all absolutely irrelevant to the issue of guilt or innocence and all highly prejudicial to the defendant's substantial rights, viz.:

1. That defendant, as an inducement to plead guilty, was "offered" three months in jail and a fine of $1,000. (R. 32)

2. That there was a clear understanding to this effect with Mr. Arterberry, Assistant United States Attorney, and Mr. Ross, Post Office Inspector, and that

defendant was to have two months to think it over. (R. 32-33)

3. That defendant, being on bail, went to New York, was returned to Texarkana, pleaded guilty and received a sentence of three years in the penitentiary and a fine of $500.00. (R. 33)

4. That later defendant asked to have his plea, and the judgment and sentence set aside; that the Court, after a hearing, duly set aside the plea, judgment and sentence, and permitted defendant to plead not guilty. (R. 34).

The Prosecuting Attorney in cross-examining the defendant submitted in evidence a certified copy of defendant's Motion to set aside the judgment and sentence. (R. 43) This document sets forth in substance what is referred to above, namely, that accused had an understanding with Prosecuting Attorney Arterberry, Special Prosecutor Shaver, and Post Office Inspector Ross, to the effect that if he pleaded guilty a recommendation of a fine of $1,000.00 and three months in jail would be made. Defendant, after hearing this proposal, conveyed to him by the United States Marshal, interviewed Mr. Arterberry in an endeavor to get him to recommend a fine of $2,500.00 and no imprisonment. Mr. Arterberry stated that he did not believe the court would accept such a recommendation but was positive that if he pleaded guilty the court would accept Mr. Arterberry's recommendation of a fine of $1,000.00 and three months imprisonment. (R. 44-46) The defendant later went to New York, and because of illness was unable to return on February 12th, the date set for his plea. He wired the District Attorney that he was ill with pneumonia. The District Attorney, however, did not wait for him to appear voluntarily but had him arrested in New York. (R. 45)

On his return he saw District Attorney Langley, at which time Mr. Langley stated that he would not himself make any recommendation. Defendant stated that he did not understand this to mean that Mr. Arterberry would not make any recommendation. He stated explicitly that he relied on Mr. Arterberry to make his recommendation and would not have pleaded guilty unless he believed Mr. Arterberry would do as he promised. He was surprised and dumbfounded when upon his plea Mr. Arterberry made no statement but the court immediately sentenced him (R. 46-47).

The prosecution, in cross-examining defendant admitted that at one time at least a promise was really extended to him provided he pleaded guilty. (R. 42) This was also admitted in the Government's response to defendant's Motion to set aside the judgment and sentence (R. 50-52). The Government, however, contended that all such promises were withdrawn by District Attorney Langley. Defendant, however, repeatedly stated that it was not District Attorney Langley that he was relying upon but Mr. Arterberry.

The further cross-examination of defendant by the prosecution found on pages 52 to 57 of the Record was likewise prejudicial, involving a statement by the Prosecuting Attorney to the effect that the Judge on hearing defendants motion had stated that it was "a judicial farce not to put a man in jail when he got away with $21,000.00." (R. 53)

The Government also tried to pin the accused down to the admission that the same facts existed at the time of his trial as existed at the time he pleaded guilty, and that accused had full knowledge of those facts, presumably in an attempt to discredit him with the jury. (R. 54)

ARGUMENT.

Summary.

1. The error is highly prejudicial as held in Heim vs. U. S.
2. The Heim Case is correct on principle.
3. Pleas of guilty are frequently entered by agreement.
4. The action of the Trial Court setting aside the plea is a conclusive determination.
5. The reasons given by the Circuit Court of Appeals are inconclusive.
6. The record shows vividly the error complained of.
7. This Court should not affirm on the theory that the Trial Judge erred in setting aside the plea of guilty.
8. The dissenting opinion in the Heim Case making a distinction between a plea as a plea and a plea as a confession is erroneous.
9. The history of the law of arraignments shows no such distinction.
10. Sec. 860 R. S. is not applicable and hence its repeal is not pertinent.
11. The Carta Case, for the Government, is wrong in principle.
12. Probable reasons for admission of confessions before magistrates.

I.

The Error is Highly Prejudicial and Reversible, as Held in Heim v. U. S.

In the case of Heim v. U. S., 47 App. D. C. 485, the Court of Appeals for the District of Columbia had be-

fore it a prosecution for adultery, wherein, upon arraignment, defendant entered his plea of not guilty. Thereafter, when the case came on for trial, he was without counsel and asked leave of the Court to withdraw his plea of not guilty, and enter a plea of guilty, which was granted. Later defendant moved the Court to allow him to withdraw this plea of guilty and again enter a plea of not guilty. This was granted and he went to trial upon this plea of not guilty. In the course of the trial the Government proved, over objection of defense, the plea of guilty. This was the only assignment of error dealt with in the opinion.

The Court held, reversing, that confessions belong in two general classes, judicial and extra-judicial. It held that a plea of guilty was a judicial confession, and that the objection of defense went to the admissibility of the confession. The Court said:

> "There is but a single question presented,—Is such an admission of guilt ever made under such circumstances as to make it competent evidence upon a trial under a substituted plea of not guilty?
>
> "A plea of guilty to an indictment is made under conditions of duress which require the utmost discretion in receiving it. A defendant should only be permitted to enter such a plea after being admonished by the court as to its consequences. When thus made, he waives the right to trial by jury, and solemnly confesses the truth of the charges made in the indictment.
>
> "* * * The plea of guilty to an indictment amounts to a conviction. It is a conclusive confession of the truth of the charge; hence, the admission of such a plea in the trial under a substituted plea of not guilty, if the confession is to be given the legal inferences which render confessions as matter of law admissible, must logi-

cally be sufficient without corroboration to sustain a verdict of guilty. *Matthews v. State*, 55 Ala. 187, 22 Am. Rep. 698; *State v. German*, 54 Mo. 526, 14 Am. Rep. 481."

The Court stated that its attention had been invited to only three cases in this country where a plea of guilty had been used against a defendant who was later allowed to plea not guilty. It then reviewed the case of *State v. Myers*, 99 Mo. 107, 12 S. W. 516. There the defendant, upon a trial of murder, pleaded guilty in open court. The court refused to accept the plea which was not recorded and set the case for trial. At the trial the prosecution proved the fact that the defendant had previously pleaded guilty. In reversing, the Appellate Court held:

"Such testimony should not have been admitted. The confession being what is termed 'a plenary judicial confession,' that is, a confession made before a tribunal competent to try him, was sufficient whereon to found a conviction. 1 Roscoe, Crim. Ev. 8th ed. 40. Consequently, the trial court might have proceeded at once to pass sentence upon the accused * * * No one would contend that, if the plea of guilty had been entered of record, such plea could have been received in evidence against the defendant, and yet the same principle is involved whether the plea actually goes upon record or not; in either case, it must, if received in evidence, be *conclusive* of the defendant's guilt * * * By refusing to receive the plea and granting the defendant *a trial*, this of necessity meant a trial with the issues of fact to be determined by the jury, and not to be determined by the previous plea of the defendant, which admitted all that the State desired to prove. In short, the trial court could not refuse to re-

> ceive the defendant's plea of guilty at one time, and then use it against him at another."

In the second case referred to by the Court in *Heim v. U. S.*, namely, *People v. Ryan*, 82 Cal. 617, 23 Pac. 121, the court reversed the conviction below upon the ground that the admission in evidence of the plea of guilty was reversible error. The court said:

> "Can it be that a privilege thus conceded to a defendant of *substituting* one plea for another is to have the inevitable effect of defeating the whole object of the 'substituted' plea?"

The third case discussed by the Court in *Heim v. U. S.*, was the case of *State v. Carta*, 90 Conn. 79 L. R. A. 1916E, 634, 96 Atl. 411. This was the only case cited in favor of submitting in evidence a plea of guilty at the trial. Referring to this case, the Court of Appeals of the District of Columbia said:

> "Three judges announced the majority opinion, resting the decision upon the case of *Com. v. Ervine*, 8 Dana. 30, a case of remote analogy, as we shall observe later. Two judges joined in a dissenting opinion, not only conclusive in its reasoning, but in which an overwhelming array of authority is marshaled."

The Court then went on to say that text writers were unanimous in condemnation of the practice, citing Wharton Crim. Evidence, 10th Ed. 638; 2 Encyc. Pleading & Practice 779; 8 Ruling Case Law 112, Abbots Trial Brief 314, and pronounced the *Ervine* case, *supra*, to be only remotely analogous.

Referring to the instruction to the jury in the Heim case, which was somewhat similar to the instruction in the present case, the Court said:

"Nor can the error be cured by an instruction of the court to the jury attempting to place a limitation upon the weight to be given evidence of such a confession. Its admission under any circumstances is such an invasion of the right of one accused of crime to a fair and impartial trial that the error is incurable. It is so destructive of the rights of the accused that the court will not stop to examine into the technical accuracy of the objection made to its admission, but will, in the furtherance of justice, take cognizance of the error and refuse to charge the defendant with any waiver of his rights through the oversight or neglect of his counsel to state with legal precision the grounds of his objection. *Wilson v. United States*, 163 U. S. 632, 41 L. ed. 289, 16 Sup. Ct. Rep. 1127, 1197; *Crawford v. United States*, 212 U. S. 183, 194, 53 L. ed. 465, 470; 29 Sup. Ct. Rep. 260, 15 Ann. Cas. 392; *Miller v. United States*, 38 App. D. C. 361, 365, 40 L. R. A. (N.S.) 973."

As to the contention that the *Ryan* case should be distinguished for the reason that the withdrawal of the plea of guilty was due to statutory authority, the Court held that, if the plea of guilty was set aside, it mattered not from what source the authority to set it aside was derived. It said:

"The authority for the act, so long as it existed, fixed the status of the defendant. After the plea of guilty was withdrawn, the case was in precisely the same condition as if the plea of not guilty had been originally entered. The admission of guilt had disappeared from the case, because the court, in the exercise of its sound discretion, had determined that, in justice, it should go out of the case. When it was stricken out, its evidential effect as a confession disappeared. To reinstate it in the form of evidence against defendant is to deprive

him of any advantage gained by the withdrawal of the plea of guilty, and restore him to a position where inevitable conviction awaited him at the hands of the jury. As was said in the dissenting opinion in the *Carta Case*, 90 Conn. 79, L. R. A. 1916E 634, 96 Atl. 411: 'Considerations of fairness would seem to forbid a court permitting for cause a plea to be withdrawn for cause, and at the next moment allowing the fact of the plea having been made to be admitted in evidence with all its injurious consequences, as an admission or confession of guilt by the accused. The withdrawal is permitted because the plea was originally improperly entered. No untoward judicial effect should result from the judicial rectification of a judicial wrong.'

"The judgment is reversed, and the cause remanded for a new trial."

This Court refused to disturb this decision when it denied the Government's petition for a writ of certiorari. U. S. v. Heim, 247 U. S. 522, 22 L. ed. 1247 (Memo.).

Of like importance: *Green v. State*, 24 So. 537 (Fla.), wherein the Court said:

"The authorities cited by counsel on this ground sustain the view that when an accused first pleads guilty to a charge, and afterwards, by permission of the court, is allowed to withdraw such plea, and put in the general issue, the plea of confession allowed to be withdrawn cannot be put in evidence on the trial."

State v. Myers, 12 S. W. 516 (Mo.), wherein the Court held:

"Evidence that defendant pleaded guilty at a former term of court, which plea the court re-

fused to receive, is inadmissible, and does not require a special objection"; and

Heath v. State, 214 Pac. 1091 (Okla. 1923), in which the Court decided that:

> "A withdrawn plea of guilty, for which a plea of not guilty is substituted by authority of court, is not admissible in evidence against the defendant."

In this last case the facts are almost identical with those herein. There the defendant had pleaded guilty and had been sentenced. Later counsel moved to be allowed to withdraw the plea and to set aside the judgment. The motion was granted; the judgment was set aside, defendant's plea of guilty was allowed to be withdrawn, and a plea of not guilty substituted. At the trial, the Court, over defendant's objection, permitted the State to introduce in evidence the record showing a plea of guilty and the judgment thereon. After the trial and conviction, the District Attorney filed a confession of error on the ground that the trial court committed prejudicial error in permitting the prosecution to introduce the plea of guilty which had been withdrawn. Reviewing this confession of error, the Court said:

> "Upon a plea of guilty, no trial upon the question of the defendant's guilt can be had. His plea stands in the place of the verdict of a jury finding him guilty, and for this reason we think that a withdrawn plea of guilty, for which, by authority of law and of the court a plea of not guilty is substituted, would not be admissible in evidence against the defendant as a confession nor as an admission against interest. In our opinion, the

rule supported by reason and authority is that a withdrawn plea of guilty, for which a plea of not guilty is substituted by authority of court, is not admissible in evidence against the defendant."

In the case of *People v. Arkins*, 33 Chi. Legal News 192, defendant pleaded guilty to receiving stolen goods and was sentenced. Later he asked the court to vacate the sentence and allow him to plead not guilty. It was proved that he had always protested his innocence and had entered the plea of guilty only on the assurance of the prosecuting witness that the judge would at once discharge him. The court said that the plea of guilty was to be treated as a confession and that being induced by hope of favor it would be set aside. This case was reviewed in 14 Harvard Law Review p. 609 and the writer there states:

"In so far as the opinion is based on the ground that a plea of guilty is to be governed by the rules applicable to confessions of guilt the court seems to have confused matters of evidence with matters of pleading. It is true that a plea of guilty does presumably involve an acknowledgment of guilt, but it is in its nature so different from an ordinary confession that the two cannot be treated on the same basis. A confession is an admission of guilt which is to be used with probative force in determining the issue raised by the plea of not guilty. It is an item of evidence which may be overwhelmed by contrary evidence. But a plea of guilty is final; it does away with a trial and is practically the same as a default in civil proceedings. It is evident that the question of allowing a withdrawal of the plea of guilty cannot with any fairness to the accused be settled within the technical rules concerning the introduction of confession in evidence. This was partially recognized

> in the opinion in the principal case where the promise of favor was made by the prosecuting witness, and not by any officer in authority, so that a confession under the circumstances would have been admissible."

The decisions above cited have been recognized, in effect, in at least two other courts. In *White v. State*, 51 Ga. 285, the Court stated that, if a plea of guilty has been withdrawn by permission and a plea of not guilty substituted, it follows that the plea of guilty simply goes for nothing. In *People v. Cignarale*, 17 N.E. 135 (N. Y. Ct. of Appeals), the court held that the withdrawal of a plea left the case without any plea whatever and that the plea thus withdrawn left no legal consequences of any sort or description.

II.

The Decision in the Heim Case Is Correct on Principle.

It is submitted that upon principle the rulings above referred to are correct. A plea of guilty is a confession of guilt and is equivalent to a conviction. (2 Hale's Pleas of Crown 225, 226; 2 Hawkins Pleas Chap. 31, see *infra*, pp. 32-34)

> "After a plea of guilty there is nothing further for a court to do than to pronounce sentence. A plea of guilty is like the verdict of the jury. There is no duty of the court to 'convict,' but only to sentence." *People v. McEwen*, 2 N. Y. Cr. 307.
>
> "A plea of guilty is not only an admission of guilt, but is a formal confession of guilt before the court in which the defendant is arraigned. It is, in this respect, altogether different from a full and voluntary confession, formally made before a

magistrate or some other person. The latter is merely evidence of guilt. *State v. Branner*, 149 N. C. 559, 562, 63 S.E. 169.

"Where the statute permits the plea of guilty and such a plea is accepted and entered by the court in a criminal case, it is the highest kind of conviction of which the case admits. *Green v. U. S.*, 40 App. D. C. 46, L. R. A. (N. S.) 1117.

A plea of guilty, therefore, stands upon an entirely different plane from any other confession, either judicial or extra judicial. It is not evidence like any other confession, tending merely to prove the charge, but it is a conviction itself. Assume that upon the retrial of a defendant who had been tried and convicted but whose conviction an appellate court had reversed, the Government opened the case by announcing to the jury that the accused had already been convicted in that very case, as the Government opened this case in the lower Court by announcing that the defendant had already pleaded guilty, would one contend such a statement proper? If uttered, how long would an appellate court attempt to weigh or determine the effect of the prejudicial error thus patently committed. A plea of guilty is more than a confession. That aspect of the plea is merged in its other aspect, that of a judicial act dispensing with a trial. In other words, a plea of guilty is just as much a judicial determination of the guilt of an accused as a conviction by a jury. If, therefore, when a conviction is set aside and defendant goes to trial anew, it would obviously be reversible error of the most flagrant type for the Government to prove the previous trial and conviction, upon what reasoning can the course be defended which the Government pursued in this case? Is the error in the latter

less prejudicial than in the former instance? Upon what ground can it be defended?

From another viewpoint, also, a plea of guilty should always be regarded as inadmissible. There is something inherently shocking to our sense of fairness in the prosecution's entering upon the trial of a case, wherein the accused is presumed by law to be not guilty until proved guilty beyond a reasonable doubt, by announcing to the jury that the accused has already acutally pleaded guilty, not to another or similar crime, but to the identical offense for which the jury is about to try him. Far fetched legal analogies as to the *right* of the prosecution to use the plea of guilty thus withdrawn, viewing it merely as a confession, should not outweigh this fundamental common sense consideration. The foundation of our criminal law is that the accused should be entitled to a *fair trial*. This should mean a trial upon the facts uninfluenced by any reference to previous acts of the defendant the effect of which the court has once destroyed. The case should go to the jury upon its merits and the evidence then presented, not upon the judicial act of the defendant in once pleading guilty,—an act the Court determined, by permitting its withdrawal, to have been either a mistake, an error of judgment, or an act in its nature involuntary, resulting from hope or fear.

III.

It is Common Knowledge That Many Pleas of Guilty Are Entered in the Hope That a Lighter Sentence May Be Awarded.

It will be noted that in the *Heim* case, the Court of Appeals gravely questioned whether a plea of guilty,

later withdrawn, is ever made under such circumstances as to make it competent evidence. That Court said that a plea of guilty is made under such conditions of duress as to require the utmost discretion in receiving it. This Court as far back as *Bram v. United States*, 168 U. S. 532, held such duress might consist in either hope or fear. Even without any direct testimony from defendant to that effect, judges and lawyers are all alike aware that many pleas of guilty are entered, not as the spontaneous act of the defendant, but with the distinct hope and expectation that he may be dealt with more leniently. This hope is founded often upon a direct understanding with the prosecution. This is the foundation of that universal rule which allows a defendant, upon pleading guilty, later to withdraw his plea, if he so desires, and to substitute in lieu thereof his plea of not guilty.

> "The court ordinarily will permit the plea of guilty to be withdrawn if it fairly appears that the defendant was in ignorance of his rights and of the consequences of his act or was influenced unduly and improperly either by hope or fear, in the making of it, or if it appears that the plea was entered under some mistake or misapprehension." (16 C. J. 398; 4 Black Com. 329; 1 Chitty Crim. Law 428-429 and cases cited *infra*, pp. 32-36)

It may be remarked that although at the present day the courts do not as a rule officially recognize arrangements between a defendant and the prosecution under which defendant pleads guilty with the understanding that he will receive a certain punishment, such a practice was formerly well known to the courts and recognized by the judges.

Hawkins, in his Pleas of the Crown, states:

"And now I am to consider what is to be done to a prisoner upon his confession; which may be either express or implied."

Sec. 3. "An implied confession is where a defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it, yielding to the king's mercy and desiring to submit to a small fine, and in which case, if the Court think fit to accept of such submission and make an entry that the defendant *posuit se in gratiam regis*, without putting him to a direct confession or plea (which in such cases seems to be left to discretion) the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall be where entry is *quod cognovit indictementum*." (2 Hawk. Pleas of the Crown, Chapter 31, Page 466, 8th. Ed. Curwood.)

This was known as far back as the time of Henry 4th. Reference to 11th. Henry 4th—65, 21; 9th Henry 6th-60; Lamb. b. 4 c. 9, Faresly 40; Ab. F. Estopped 24, amply sustains the antiquity of the practice.

In a note to 2 Hales Pleas of the Crown 226, there is the following:

"In trifling personal injuries the prosecutor and defendant frequently settle the charge in private, and the latter comes into court and pleads guilty to the indictment; and upon proof of a general release given by the former submits to a small fine for a breach of the peace which his conduct has occasioned." (1 Burns J. 867)

Chitty, in his Criminal Law, pages 429, 430, 431, fully recognizes implied confessions and gives directions as to the procedure, referring to cases where the prosecutor and the offender agree in private and the latter

submits in court a general release from the former and pays a small fine.

> "Thus also the defendant may, after traversing the indictment, come in and withdraw his plea of not guilty, and confess without entering his traverse, either on an agreement with the prosecutor, or on giving him proper notice of his intention." (1 Chitty, Crim. Law, 430.)

In our own day it frequently happens that the defendant and the prosecution will agree that if defendant will plead guilty the prosecution will recommend a given sentence. Such agreements are frequently carried into execution. There are even cases where upon a sentence being awarded in excess of that agreed upon, the accused has been allowed to plead not guilty.

In *State vs. Kring*, 71 Mo. 551, the Lower Court was reversed and instructed to allow defendant to enter a plea of not guilty where the sentence given was in excess of that agreed upon. To the same effect is *State vs. Stephens*, 71 Mo. 535.

IV.

The action of the court in allowing defendant to change his plea from guilty to not guilty is a conclusive determination that the plea was not voluntary and this determination is binding upon the trial judge.

Where a court allows such a plea to be withdrawn, its action conclusively establishes the fact that the plea was, initially, involuntary or a mistake. Otherwise the Court's action is reduced to an absurdity. Certainly if a court were convinced that the plea was strictly voluntary and entered with a full understand-

ing of its nature if would never allow the accused to withdraw his plea at all. It would not do so through mere caprice. The Court is not compelled by law to allow him to change his plea and numerous authorities may be cited for this proposition. (*Reg. v. Sell*, 9 Car. & P. 346; *Gardner v. People*, 106, Ill. 76; *Sanders v. State*, 85 Ind. 318; *State v. Stephens*, 71 Mo. 535; *State v. Calhoun*, 50 Kans. 523; *People v. Lenne* 67 Cal. 113; *People v. Arkins*, 33 Chi. Legal News 192; *16 C. J. 397*, note 6; page 398, note 12.) If, therefore, a court has granted a defendant's motion to withdraw his plea of guilty, it must have found that the plea was in some sense involuntary, *i. e.*, induced by hope or fear. If it was involuntary, it is inadmissible even as a confession. The latest definition by this Court of a voluntary confession is in the *Wan* case, that "a confession is voluntary in law if, and only if, it was in fact voluntarily made." (*Wan v. United States*, 266 U. S. 1, 14.) When, therefore, the court has permitted a defendant to withdraw his plea of guilty, a conclusive presumption should result that such plea was involuntarily entered, within the meaning of the law. This ought to render the question of its voluntary character and its admissibility against the defendant later *res adjudicata* for the entire case. This is the only logical result which can flow from the action of the Court when it allows it to be withdrawn.

And as to its discretion and right to deny a request to change such a plea, see cases above cited.

The error committed by the trial court and inadvertently affirmed by the Circuit Court of Appeals is clear upon an inspection of this record. Throughout, the plea of guilty has been treated as an ordinary *extra-judicial* confession, and the law and the practice

in determining admissibility of the latter erroneously applied to the admission of the plea. The distinction between the two is plain and of the most vital importance to the defendant, as hereinbefore pointed out. Thus, the trial court instructed the jury that:

> "The plea of guilty is introduced as evidence by the Government. You are to take that into consideration, that is, you will take it into consideration upon a certain condition. If you find that Mr. Kercheval made that plea of guilty and no promise was held out to him for the purpose of getting him to make that plea, or if you find that he was notified before he made the plea that nothing that was ever said to him with reference to it theretofore would be met, then it is evidence for you to consider in connection with the other evidence in the case. If you find out however that he was included, and you are to take all the facts and circumstances into consideration—you are to take Mr. Kercheval's intelligence into consideration in connection with whether or not he could be deceived in a matter of that kind. I say if you find that he was deceived; that this was brought about by conversations that he had had with reference to it, and that he made that plea of guilty when as a matter of fact he was not guilty, then you will disregard that particular part of it and consider just the other testimony in the case."

The Circuit Court of Appeals in its opinion sustaining that portion of the charge says:

> "While there was evidence of defendant that some promise had been made him by a Special Assistant District Attorney, Mr. Arterberry, as to punishment in case he pleaded guilty, the evidence of the District Attorney shows that defendant was fully informed by him before the plea that if he

did plead guilty it would be upon his own volition and that no promises whatever would be made to him. It is true in the federal courts, as stated in Ziang Sung Wan v. United States, 266 Fed. 1, 14, that 'the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made.' There is no claim here of any compulsion applied to defendant. The court left it to the jury as to whether the plea of guilty was voluntary or made under some kind of a promise held out to him by which he was deceived. If the latter it was to be entirely disregarded. Certainly this was all defendant could claim under the facts of this record. McBryde vs. United States, 7 Fed. (2d) 466. In the motion made by defendant to set aside the judgment he admits that he had pleaded guilty. The purpose was to reduce the punishment, but if this failed he asked to withdraw his plea, and that the judgment be set aside. We know of no reason why the plea of guilty was not admissible under all these circumstances for what it might be worth. It was not conclusive of guilty and the court so instructed the jury. The defendant probably knew better than anyone else whether or not he was guilty. Under the evidence in this case a plea of guilty upon his part would have seemed a very reasonable thing. We see no substantial or prejudicial error in the admission of any of the evidence complained of."

Thus, both at *nisi prius* and on writ of error, the law which directed the jury in its deliberations and sustained the trial judge in his charge was the law which governs the admissibility of *extra judicial* confessions, not *judicial* confessions in the form of a plea of guilty which in itself is in effect a conviction, not

merely evidence for the consideration of the jury in proving a conviction. This is clearly pointed out in *Heim vs. United States, supra. McBryde vs. United States*, 7th Fed. (2d) 466, relied upon by the Circuit Court of Appeals in its opinion is authority only in reference to *extra judicial* confessions. Two of the four cases quoted as authority by the court in *McBryde vs. United States* originated in the District of Columbia, resulting the one in a reversal in this Court of the United States and the other in merely following the settled law of the District of Columbia and Federal Courts generally in regard to the admissibility of *extra judicial* confessions. That the jury should not always be allowed to consider even an *extra judicial* confession upon instruction as to the law in reference thereto, is established by the reversal of the Court of Appeals of the District of Columbia in the *Wan* case, *supra*. In that case the trial judge thought it proper to follow the settled practice and permit Wan's confession to go to the jury under the law governing its admissibility as given the jury by the court. In that case also there was conflict in the evidence surrounding the making of the confession, a sharp and serious conflict. The presiding justice believed it the duty of the jury to resolve that conflict and to consider or reject the confession according to their determination of the truth of the circumstances under which it was made—a practice hazardous for the accused at best where there is any substantial evidence that the confession was made under circumstances rendering its character involuntary. In reversing, this Court unanimously held that, notwithstanding the conflict in testimony, as matter of law the confession was involuntary and the trial judge should have refused to permit it in evidence

before the jury. Wan has been retried twice since. In neither trial did the prosecution attempt to introduce that confession. The evidence was carefully and strictly limited. The line to which the testimony might approach was marked sharply and nicely. The court was diligent to protect Wan from any reference to his former confession. The jury neither knew nor heard anything of it. It was as if the confession had never been made. In the instant case the court had once concluded the plea of guilty was entered under such circumstances that, upon application for leave to withdraw the same, the plea was withdrawn and another substituted in its place. That determination, allowing the motion to withdraw, concluded just as finally the questions improperly raised at this defendant's trial to his disadvantage as the decision of this Court finally settled all reference to the confession of Wan.

In *Murray vs. United States*, 2nd Fed. 888, 893, 52 App. D. C. 119, the Court of Appeals of the District of Columbia merely announced the familiar principle of law applicable to the admissibility *of extra judicial* confessions whenever their admission in evidence at the trial is attacked upon appeal. Both the *Wan* and the *Murray* cases, therefore, are authority only for confessions made outside the forum of the court and in no way relate to the right of the prosecution to introduce in evidence against the defendant a plea of guilty made in the solemnity of a judicial proceeding, but later withdrawn by leave of the same tribunal after motion made and hearing had thereon. The same court which considered both the *Wan* and the *Murray* cases is the only Federal Court, so far as the diligence of counsel can discover, which has had before it for decision the admissibility in evidence against

the defendant of both *extra judicial confessions* and *a plea of guilty entered but withdrawn by leave of court*. The great weight of State authority is with the opinion in *Heim vs. United States, supra*. Of the distinction between the two the Court of Appeals of the District of Columbia says:

> "We are not here concerned with the rules which govern the admissibility of extra judicial confessions or judicial confessions made before a committing magistrate, which stand upon an entirely different plain from the grade of judicial confessions we are here considering. The plea of guilty to an indictment amounts to a conviction. It is a conclusive confession of the truth of the charge; hence, the admission of such a plea of the trial under a substituted plea of not guilty if the confession is to be given the legal inferences which rendered confessions as matter of law admissible, must logically be sufficient without corroboration, to sustain a verdict of guilty. Matthews v. State, 55 Ala. 187, 28 Am. Reps. 628; State v. German, 54 Mo. 625, 14 Am. Reps. 481."
>
> (*Heim v. United States*, 47 App. D. C. 485, 488, 489.)

Thus, the reasoning of both the trial court in this case and of the Circuit Court of Appeals in its opinion becomes inapplicable. We are no longer concerned with the reasons impelling this defendant's plea in the first instance, his motives or his hopes in making the same. They are not for consideration. They were properly for the determination of the judge who heard and passed on the motion for leave to withdraw. Such questions as whether Mr. Langley informed the defendant no promises would be extended him in the event he pleaded guilty or whether the defendant relied

on Mr. Arterberry's assurance, which were commented upon by the Court below, were for the attention of the judge upon the hearing of the application to withdraw. Once he determined the plea ought to be withdrawn, that ended all inquiry into those matters, and neither another trial judge nor any jury could sit upon his decision by way of review either to correct the same, listen to a reargument of that motion for leave to withdraw or determine the truth of defendant's contention that, when he entered his plea, he did so through hope, fear, or any other influence which rendered it of an involuntary character.

V.

The Reasoning of the Circuit Court of Appeals Herein Is Inconclusive.

The Circuit Court of Appeals in holding the admission of the plea of guilty was no error apparently bases its decision upon two grounds:

1. It could not have been error because it was left to the jury to decide whether the plea was voluntarily entered. (R. 74-75)

2. Because the defendant "knew better than anyone else whether or not he was guilty. Under the evidence in this case a plea of guilty upon his part would have seemed a very reasonable thing." (R. 481)

As to (1) above, it is obvious if this were true, no confession, however inadmissible, would ever constitute reversible error. As to (2), this simply begs the question. In effect the Circuit Court of Appeals says "The plea of guilty was admissible because you *were* guilty." But it is absurd to test the admissibility of a confession by taking for granted what the confes-

sion is intended to prove. This is altogether too simple a solution of the matter and hints at the possibility that the Circuit Court of Appeals never considered the point seriously. Its attention was not drawn to the *Heim* case and other cases in point until a petition for Rehearing was filed, and that Petition was promptly denied.

VI.

The record in the present case shows vividly the evil of the error complained of.

The astounding consequence to the defendant which can flow from attempting to introduce in evidence his formal plea of guilty withdrawn by leave of court is evidenced by what transpired in this case when the attempt to introduce this plea was made. The error committed was particularly flagrant for the reason that the government opened its case to the jury by stating that the defendant had previously pleaded guilty (R. 29). It later submitted in evidence a certified copy of that plea (R. 31). It then attempted to submit the judgment of conviction entered upon the plea thus made. Upon objection as to the competency of the entry of that judgment, the prosecuting attorney, in the presence of the jury, stated that its purpose was:

> "Nothing further than to show that the plea was not attempted to be withdrawn until after judgment and sentence was pronounced. And then, when it was set aside further we can show, and will show, if necessary, that after judgment a motion was filed by defendant not to set aside the plea of guilty. He did not ask for that in the motion, but admitted in the motion that the plea had been entered and asked for the sentence to be reduced. However, we will not offer this at this time." (R. 31)

What situation can possibly be imagined more prejudicial to the interests of a defendant entitled to a fair and impartial trial than this? The prosecuting officer first proves the plea of guilty once entered but later withdrawn and then impugns and attacks the motives of the defendant and his reasons for withdrawing it! Those motives and reasons were properly for the consideration of neither the prosecuting officer nor the jury. The court had passed upon them once. Having found the reasons sufficient and the motives proper, the act of withdrawal was no longer the subject of attack by the prosecution as the act of the defendant. If the subject of comment at all, it could be attacked only as the error of the judge.

With the fact of his plea proved against him and his motives and reasons for withdrawing the same assailed, over his objection and exception, the defendant was then driven in his own case to explain the circumstances surrounding his entering the plea. The record (R. 32-57) is filled with examination and cross-examination of the defendant regarding conversations had, promises extended, assurances made, hopes raised, and then contrary statements in reference to all of these, all to the most serious damage of the defendant and all made necessary by the initial error made by the court in permitting the plea to be introduced at all after the court had once permitted it to be withdrawn. It is difficult to imagine how more prejudicial error could be committed against a defendant.

VII.

Even If This Court Should Believe the Trial Court Erred in Setting Aside the Plea of Guilty, Still It Should Not Affirm.

Counsel for defendant face with frankness this possible contention: That the purpose of defendant's motion which resulted in the plea of guilty being set aside was not to withdraw the plea of guilty but merely to reduce the punishment. From this it may be argued that the Trial Court erred in setting aside the plea of guilty and this court should affirm the decision below on the theory that "no harm was done."

It is submitted that this should not be the decision. Whatever the *purpose* of the motion, the defendant thereby clearly asserted his innocence of the offense charged. Even conceding, for the sake of argument, that the trial judge should not have set aside the plea of guilty, his action cannot legally be reversed by allowing such plea to be used in evidence against defendant. The question before this court is whether a plea of guilty having once been set aside, it still remains, or vestiges of it still remain, in such a way that it can be used against the defendant at the trial, and whether it is proper that it should be so used. It is submitted that once the trial judge set it aside it was set aside in every way and for all purposes. This was the law of the case from that moment on and from the Constitutional prohibition against a governmental appeal in a criminal case after the jury is sworn, it follows that such action of the judge is final and incapable of reversal either directly or otherwise.

VIII.

The Basis of the Dissenting Opinion in the Heim Case i. e. That a Plea of Guilty is Divisible Into (a) The Plea Itself and (b) The Plea as a Confession Makes a Distinction Unknown to the Law and for Which No Authority Can Be Cited.

It is clear from a reading of the dissenting opinion in the *Heim* case that the principal ground of the dissent is the theory that although the plea of guilty may be set aside *as a plea* it still remains as a confession and admissible if it be voluntary. Aside from the fact that this renders the trial Judge's action in setting the plea aside an absurdity, which point has previously been discussed, the entire conception is alien and novel. The nearest analogy would be division of a confession into (a) the confession proper, and (b) the confession as a verbal act. But no one would contend that a confession inadmissible in itself would be admissible as a verbal act. The distinction openly recognizes and exposes the further absurdity of the trial Judge himself deciding that the plea of guilty was involuntary as a plea and yet submitting the same question to the jury viewing the plea as a confession.

IX.

The History of the Law of Arraignments Shows There Can Be No Such Distinction.

As before stated the distinction made in the dissenting opinion in the *Heim* case between a plea as a plea and a plea as a confession, is entirely unknown to the law. An examination of the history of arraignments and pleas shows that no such distinction could be made

for the reason that strictly speaking there was no such thing as a "*plea*" of guilty. If the defendant desired to come in and admit his guilt, he confessed in open court. If not, he filed a plea, i. e., a plea of not guilty.

Thus, Staundford, in his Pleas of the Crown, b 2, c 51, published 1607, states:

> "If one is indicted or appealed of felony and on his arraignment he *confesses* it, this is the best and surest answer that can be in our law for quieting the conscience of the judge and for making it a good and firm condemnation; provided, however, that *the said confession* did not proceed from fear, menace, or duress, which, if it was the case, and the judge had become aware of it, he ought not to receive or record this confession, but cause him to plead not guilty and take an inquest to try the matters." (Italics ours)

Sir Mathew Hale says:

> "Concerning the plea of a prisoner upon his arraignment, the first of his confession of the fact charged:—When the prisoner is arraigned and demanded what he saith to the indictment, *either he confesseth the indictment*, or *pleads* to it, or stands mute and will not answer."
>
> "A confession is either simple, or relative in order to the attainment of some other advantage. That which I call a simple confession is where the defendant upon hearing of his indictment, without any other respect *confesseth it, this is a conviction;* but it is usual for the Court, especially if it be out of clergy, to advise the party to plead and put himself upon his trial, and not presently to record his confession, but to admit him to plead." (27 Assiz. 40)
>
> If it be but an extrajudicial confession, though it be in Court, and where the prisoner freely tells

the fact, and demands the opinion of the Court whether it be felony, though upon the fact thus shewn it appeared to be felony, the Court will not regard his confession, but admit him to plead to the felony not guilty. (22 Assiz. 71) (Stamf. P. C. Lib. II, cap. 51, fol. 142 b. (1) 2 Hales Pleas of the Crown, 225-226). (Italics ours.)

Serjeant Hawkins in his Pleas of the Crown, Chapter 31, "Of Confession and Demurrer," states:

"And now I am to consider what is to be done to a prisoner upon his *confession;* which may be either express or implied.

Sect. 1. An express confession is where a person directly confesses the crime with which he is charged, which is the highest conviction that can be, and may be received, after the plea of 'not guilty recorded, notwithstanding the repugnency; for the entry is, that the defendant *postea or relicta verificatione "Cognovit Indictamentum.'"* (S. P. C. 142 Lamb. b. 4, c. 9, Finch 38.)

"And where a person upon his arraignment actually *confesses* himself guilty or unadvisedly discloses the special manner of the fact supposing that it doth not amount to felony, where it doth, yet the judges, upon probable circumstances, that such confession may proceed from fear, menace, or duress, or from weakness, or ignorance may refuse to record such confession, and suffer the party *to plead not guilty."* (S. P. C. 141. 1 Hale 225)

Sect. 3. "An implied confession is where defendant, in a case not capital, doth not directly own himself guilty, but in a manner admits it, yielding to the king's mercy and desiring to submit to a small fine, and in which case, if the Court think fit to accept of such submission and make an entry that the defendant *posuit se in pratiam regis,* without putting him to a direct *confession or plea*

(which in such cases seems to be left to discretion) the defendant shall not be estopped to plead not guilty to an action for the same fact, as he shall be where entry is *quod cognovit indictamentum.*"

Sect. 4. "I take it for granted, that no *confession* whatever shall, before final judgment, deprive the defendant of the privilege of taking exceptions in arrest of judgment to faults apparent in the record."

(2 Hawkins Pleas of the Crown 8th Ed. By Curwood, page 466, 467.) (Italics ours.)

Lord Coke in his Institutes referring to arraignment, states:

"But in case of high treason, if the party refuse to answer according to law, or say nothing, he shall have such judgment by attainder, as if he had been convicted by *verdict* or *confession.*

The difference between a man attainted and convicted is, that a man is said convict before he hath judgment; as if a man be *convict by confession, verdict*, or recreancy."

(3 Coke Institutes, Chapt. 14, Thomas's Ed. pages 558, 559.) (Italics ours.)

It will be noticed that Lord Coke refers to conviction by "verdict or confession," *i. e.*, verdict after a plea of not guilty or confession in open court. The same words are used in the statute of 12th George 3, C-30, enacting:

"That if any person being arraigned upon any indictment, or appeal of felony or on any indictment for piracy, shall stand mute, or will not answer directly to the felony or piracy he shall be convicted of the offense, and the court shall thereupon award judgment and execution, as if such person had been convicted by *verdict or confession*, and the judgment shall have the same consequences."

Similarly the Statute of 7 Wm. 3, C-3.

> "No indictment or trial for high treason shall be had except on the testimony of two lawful witnesses."
>
> 'Unless the party arraigned, indicted, or tried shall willingly and without violence in open court *confess* the same he shall stand mute.' (Italics ours.)

Blackstone likewise states:

> "When a criminal is arraigned, he either *stands mute or confesses the fact;* which circumstances we may call incidents to the arraignment; *or else he pleads* to the indictment, which is to be considered as the next stage of proceedings. But, first, let us observe these incidents to the arraignment, of standing mute or *confession.*" * * *
>
> "The other incident to arraignments exclusive of the plea, is the prisoner's actual *confession* of the indictment. Upon a simple and plain *confession,* the court hath nothing to do but to award judgment: but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject; and will generally advise the prisoner to retract it and plead to the indictment." (4 Black, Com. 324, 329.) (Italics ours.)

Stephen in his Commentaries uses practically the same words:

> "When a person is arraigned, he either stands mute or *confesses* the fact; or else he pleads to the indictment."
>
> * * * * * * * * *
>
> "The other incident to arraignments, exclusive of the plea, is the prisoner's confession to the in-

dictment. Upon a simple and plain confession, the court has nothing to do but to award judgment, but the court in capital cases is usually very averse from receiving and recording such confession, and generally advise the prisoner to retract it and plead to the indictment." (4 Stephen's Com. Chap. 23, 18th Ed. 329, 331.) (Italics ours.)

Similarly, in considering "*Plea and Issue*" he states:

"We must now consider the *plea* of the accused."
(Stephen Com. 18th Ed., page 333.) (Italics ours.)

Chitty, in his criminal law states:

"The last incident of the arraignment is *confession.* * * * and the courts are very reluctant to receive and record such confessions especially where the punishment is capital, and will frequently, out of tenderness to the life of the subject, advise the prisoner to retract it and plead not guilty. And where he freely in court discloses the facts of his case and demands the opinion of the judges whether they amount to felony upon which they reply in the affirmative, they will refuse to record the disclosure and admit him to the full advantage of a trial upon the evidence of the witnesses." (1 Chitty Criminal Law, Capt. 10, pages 428-429.) (Italics ours.)

Pollock and Maitland in their history of the English Law state:

"A man who *confessed* a felony in court or before a coroner was condemned upon his *confession*, and the coroner's record of his confession was indisputable." (2 Pol. & Mait. 653.) (Italics ours.)

It is clear from the authorities above cited that the old English Law made no distinction between a confession and a plea of guilty, rather it may be said that the confession was the plea of guilty. It is obvious from the admonitions against the reception of confessions in open court under circumstances showing ignorance, fear, duress or hope of reward that once a confession was set aside and the defendant allowed to plead not guilty the court would not have permitted the fact of his having made the confession to have gone to the jury. In support of this it may be said that though counsel have diligently searched the books, no single case has been found recorded in England from the earliest times down to the present day in which after a defendant, upon arraignment, had confessed in open court, and the court had admonished him to plead not guilty, the Court still allowed such earlier confession to be introduced in evidence against him.

Hawkins in his pleas of the Crown, Book 2, Chap. 46, Sec. 29 to 43 enumerates different kinds of confessions which are admissible against the defendant. It is significant that neither here nor in Chapter 31 dealing with "Confession and Demurrer" does he make any mention of a case similar to the present. Inasmuch as it is clear from Staundford, Hale, Hawkins, Chitty, and others already cited that in those days it was the practice of judges to receive confessions in open court, similar to a present plea of guilty, with great compunction, it is reasonable to conclude that more pleas of guilty were set aside then than now and that situation similar to the present case arose more frequently in those days than they do at present. The fact that in none of the books may any mention be found of a court setting aside a confession in open

court and allowing a defendant to plead not guilty but still permitting the original confession to be admitted in evidence against the accused is of the highest significance. It shows that no such practice existed.

The whole purport of Staundford, Hale, Hawkins and others above quoted shows how impossible it would have been for a judge in those days to have set aside a confession or plea of guilty in one breath and yet allow it to go to the jury with the next.

X.

Section 860 Revised Statutes Repealed by the Act of May 7, 1910 (Chapter 216—36 Stat. 352) Has No Reference to the Present Case.

In the dissenting opinion in *Heim vs. U. S.* and argument is made to the effect that Congress, by repealing Section 860 R. S., has indicated an intention that a plea of guilty may be used against a party. Section 860 R. S. reads as follows:

> "No pleading of a party, nor any discovery of evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture; *provided* that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering he testified as aforesaid."

It is apparent from a reading of this section that it was never intended to apply to a criminal plea. "A pleading" is obviously not the same as a plea. The

section was evidently intended to apply to a civil pleading and was intended to protect the witness against criminal proceedings based upon disclosures obtained from him or pleadings filed by him in a civil case.

A reference to the Legislative history of Section 860 R. S. confirms these statements. This Section was the Act of February 25, 1868 (15 Stat. 37). It was introduced as Senate Bill No. 306 by Senator Frelinghuysen and was referred to the Committee on the Judiciary January 30, 1868. (40 Cong. Globe, Page 845)

Later, the Committee on the Judiciary directed Senator Frelinghuysen to make an oral report to the Senate of the Committee's conclusions. Senator Frelinghuysen gave the following explanation of the Bill:

> "It has been discovered in some suits of the United States where they have sought a disclosure from parties, that they have interposed the plea that making such disclosure in answer—for instance, to a Bill of discovery—would subject them to forfeitures and penalties, and the courts have recognized that plea as a sufficient defense against making the discovery. To obviate that difficulty and in order that the government may get such information as is necessary, this Bill has been requested on the part of the government and approved by the Judiciary Committee."

Senator Trumbull also stated:

> "It is the law now in some of the States, and we have a similar law in regard to testimony before the Committees of Congress compelling parties to testify—this bill proposes that he shall not be excused from testifying on the ground that the answer might be used against him in a penal proceeding or in a criminal proceeding."

Similar statements were made by Senators Davis and Henderson, and the Bill was thereupon passed. (60 Cong. Globe, Feb. 4, 1868, pages 950, 951.)

The above explanation of the scope of the bill is further contained by the proceedings leading up to its repeal. It was repealed by the Act of May 7, 1910, which was originally H. R. 16267. The report of the Committee on the Judiciary of the House, referring to Sec. 860, states:

> "This Section was enacted apparently for the purpose of enabling the government to compel the disclosure of incriminating testimony on condition that the witness disclosing the same would be given immunity. In the case of Counselman v. Hitchcock, 142 U. S. 547, it was held that Legislation cannot abridge a constitutional privilege. * * * Since the decision above referred to, Section 860 has possessed no usefulness whatever."
>
> (House Report No. 206, 61 Cong. 2nd Session.)

The Senate report of the Committee on the Judiciary on the same Bill adopts the report of the Judiciary Committee of the House above quoted. Going further, it shows that the Legislation in no way referred to a criminal plea. (Senate Report No. 502, 61 Cong. 2nd Session.)

The debates in the House and the Senate on a Bill to repeal Section 860 R. S. likewise show that the object of the Legislation is not in any way to effect a criminal plea of guilty or not guilty. (See Vol. 45, Part 3, Cong. Rec., 61st Cong., 2nd Session.)

(House Debate, pages 2251-2252; Senate Debate, 3564-3565.)

The report of the Attorney General for the year

1908, pages 22 and 23, shows that the government's view of the Bill was the same as that of Congress.

No case has been discovered where Sec. 860 has been applied to a criminal plea.

XI.

The Decision in the Carta Case is Wrong in Principle.

The *Carta* case, 96 Atl. 411 (Conn.) has been referred to by the government as the leading case in its favor on the question here involved. The facts were substantially similar to those in the present case with this exception: That the State offered the proof that defendant had pleaded guilty not as a confession but as showing conduct inconsistent with innocence. In the present case there was no such qualification. Proof of the plea was made for all the damage it could do. In sustaining this action, the majority opinion in the *Carta* case argues that it must be presumed the plea of guilty was voluntary and was in fact voluntary as a confession. The court states that there was no "misunderstanding" between the defendant and prosecution leading to the entering of the plea. The action of the trial court in setting the plea aside is, therefore, a grand anomaly. The Appellate Court does not attempt to explain it, but excuses it with these words:

> "We suppose that the Universal practice in this State has been for the court to exercise that discretion in favor of the accused to permit him to change his plea and leave it to the jury to decide the question of his guilt."

In other words it was simply an act of grace or indulgence on the part of the trial Court.

This view makes the action of the trial court an absurdity if the facts show that the defendant knows what he is doing when he pleads guilty and by so doing confesses, under circumstances of the utmost solemnity and finality, his guilt, and if there was no inducement, by way of understanding with the prosecution or in any other way. It certainly cannot be supposed that the court would allow him to change his plea merely because he wanted to. This would reduce judicial proceedings to a game in which the actions of the judge would be dictated not by common sense and judicial acumen but by a sort of sentimental sportsmanship.

The Court then argues that inasmuch as a plea of guilty before a Justice of the Peace or a Committing Magistrate can be proved upon the trial, that this is authority for allowing a plea of guilty submitted at the trial itself but later withdrawn, to be likewise used. But the two cases are utterly dissimilar. In the first place there is no such thing as a "plea of guilty" before a Committing Magistrate. The defendant does not plead. He is not compelled to say anything and if he does make a statement it is simply an admission or confession, in its nature voluntary. In the second place it overlooks entirely the fact that the plea of guilty made in court *has been set aside*. Suppose the so called "plea of guilty" on confession before the Committing Magistrate has been set aside or held for naught, would anyone then argue that it would later be admissible at the trial in the upper court?

The Court continues:

> "The withdrawal of the plea withdraws the evidence of conviction, but it does not withdraw the fact that such a plea was entered. It is as competent to give evidence of that fact as to give evidence that a similar fact occurred in the Justice's or Magistrate's Court."

This does away with all rules of evidence relating to relevancy and competency. The mere fact that a given thing happened is no reason for allowing it in evidence. It must first be proved relevant, competent and material. A confession procured by duress or inducement would not be admissible simply because it was "a fact."

XII.

Probable Reasons Why Confession Before Committing Magistrate Regarded as Admissible.

It is not the purpose of this brief to enter into a discussion of the complicated question of why a confession made in a preliminary hearing before a Committing Magistrate is admissible in the trial court. The English law is not entirely consistent on this subject, and as pointed out by Wigmore (1 Wigmore, Ev. Sec. 817) there have been various stages in the history of the law of confessions from the time when duress was common and torture sometimes inflicted to the present when ample safeguards are placed about the prisoner. A confession before a Magistrate is like other extra-judicial confessions and the ordinary rules apply. It is probable that the reason they were early held admissible was because such examination was pursuant to Statute and the law considered that the defendant's rights would be amply safeguarded in the hands of its own appointed Judges. Thus under the Statutes of 1 and 2 Phillip & Mary C. 13, and 2 and 3 Phillip & Mary, C. 10, Justices of the Peace and Coroners had power to take examinations of the party accused and to put them in writing. Sir Matthew Hale states that such examinations are admissible in evidence upon the following conditions:

"1. Oath must be taken either by the Judge, the Coroner that took them, or the clerk that wrote them, that they are the true substance of what the informer gave in upon oath, and what the prisoner confessed upon his examination.

2. As to the examination of the prisoner it must be testified that he did it freely without any menace or undue terror imposed upon him; for I have often known the prisoner to disown his confession upon his examination, and hath sometimes been acquitted against such his confession; *and the reason why these examinations and informations are admissible in evidence (under the occasions above premised) is because they are Judges of record and the informations on them upon oath are authorized and required by Act of Parliament*, and they are judges of the crimes upon which the informations are taken." (Italics ours.)

(2 Hales Pleas of the Crown, Chap. 38, pages 284, 285.)

And later he states:

"If a Justice of Peace takes information in a case of high treason, it seems these cannot be read in evidence upon an indictment of treason, *because high treason is not within that commission.*" (Italics ours.)

(Hale's Pleas, pages 285-286.)

To the same effect is 2 Hawkins' Pleas of the Crown, Chapter 46, Section 29; Chitty Crim. Law, pages 570-571. The two statutues of Phillip & Mary above referred to were repealed by the Statute of 7 Geo. 4, Chap. 64, which required the Justice of the Peace before committing any person for felony "to take the examination of such person and such Justices shall subscribe of such examination, information, bailment, and recognizances and deliver the same to the proper

officer of the court in which the trial is to be before or at the opening of the court."

A further reason why such confessions were admissible is the fact that defendant is not compelled to make a statement before the Committing Magistrate and hence anything said by him may be regarded as free and voluntary. The law was settled early that a confession *under oath* before a Committing Magistrate was inadmissible. (2 Hawkins Pleas of the Crown, Chapter 46, Section 35; 1 Starkie 242; 1 Chitty Criminal Law 573; 1 Hale P. C. 585; 2 Hale 52, 120, 284; Bac. Ab. Evidence; L. Burn, J. Examination. Dick, J. Examination 3.)

Chitty states:

> "The examination of the prisoner ought not to be upon oath and when thus taken it has been rejected. On first view it might appear unreasonable to refuse in evidence a confession made under this sanction, requiring the stricter adherence to truth, and which would otherwise have been evidently admissible; but it must be remembered, that every admission of the prisoner must, in order to render it available, be purely voluntary; and that the dread of perjury, with the apprehension of additional penalties in case he deviates from the truth, may create an influence over his mind, which the law is particularly scrupulous in avoiding."
>
> (1 Chitty, Crim. Law 86.)

While modern legal thought would probably not assent to the last quoted statement we are not concerned here with its logic, good or bad, but simply with the reasons why such examinations before Committing Magistrates were considered admissible. The fact that such statements by the defendant were made in

accordance with statute; that defendant was not compelled to make any statement and that if he was compelled, by putting him under oath, his statement was inadmissible, seems a sufficient explanation of the fact. But it is evident that these reasons do not apply where the alleged confession is in the form of a plea of guilty, which plea has been set aside.

For full discussion of the history of the admissibility of confessions see 1 Wigmore Evidence, Section 817.

Conclusion.

In view of the foregoing it is respectfully submitted that the judgment below should be reversed and the cause remanded with instructions to grant a new trial.

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January, 1927.

No. 768

In the Supreme Court of the United States

October Term, 1926

ROBERT DAVIS KENNEDY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinion below	[illegible]
Jurisdiction of this Court	[illegible]
Statement	[illegible]
Argument	[illegible]
Conclusion	[illegible]

AUTHORITIES CITED

[illegible] v. United States, [illegible] App. D. C. [illegible]	[illegible]
State v. [illegible], [illegible] Conn. [illegible]	[illegible]
Act of February [illegible], [illegible], c. [illegible], [illegible] Stat. [illegible]	[illegible]

[illegible] (I)

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 705

ROBERT DAVID KERCHEVAL, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Circuit Court of Appeals may be found at page 475 of the record. It is reported in 12 F. (2d) 904

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered on May 4, 1926. (R. 483.) A petition for rehearing was filed and entertained, but denied on July 26, 1926. (R. 503.)

The jurisdiction of this Court to grant the writ prayed for was conferred by the Act of February 13, 1925. (C. 229, 43 Stat. 936, 938.)

STATEMENT

Petitioner was convicted in the United States District Court for the Western District of Arkansas, under an indictment charging him with using the mails in the promotion of certain fraudulent oil companies. (R. 1 and 23.) He was sentenced to serve concurrently sentences of three years on each of five counts of the indictment, and to pay a fine of three hundred dollars on each count. (R. 25.) On writ of error, the judgment of conviction was affirmed. (R. 483.)

As justifying further review by this Court, he alleges error on the part of the trial court, concurred in by the Circuit Court of Appeals, in admitting in evidence a previous plea of guilty to the indictment here involved, which plea, by leave of court, had theretofore been withdrawn, and a plea of not guilty substituted. He also urges that error was committed by the courts below in holding that even though the indictment charged that petitioner intended to convert to his own use the moneys received by him from the public, it was unnecessary to prove such allegation, as it is not "an element of crime under Section 215 of the Penal Code." R. 482.)

ARGUMENT

On the main question raised by petitioner, viz, whether a withdrawn plea of guilty may be thereafter introduced in evidence against him at his subsequent trial, there exists a conflict between the

decision of the Circuit Court of Appeals below and the decision of the Court of Appeals for the District of Columbia in *Heim* v. *United States,* 47 App. D. C. 485. In the latter case the Court of Appeals held, one judge dissenting, that it was reversible error for a trial court to permit the withdrawn plea to be so introduced. The Government sought to obtain from this Court a writ of certiorari in that case, but it was refused. 247 U. S. 522. What is regarded as the leading State case upon the point is that of *State* v. *Carta,* 90 Conn. 79, in which it was held, by a divided court, that it was permissible to introduce against a defendant a withdrawn plea of guilty.

CONCLUSION

In view of the general importance of the question in the administration of the criminal laws, and the conflict of decisions thereon, the Government does not oppose the granting of the writ prayed for.

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O. R. LUHRING,
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NOVEMBER, 1926.

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INDEX

	Page
Opinion of the court below	1
Jurisdiction	1
Statement	2
Assignments of error	3
Summary of argument	5
Argument:	
It was not error to admit in evidence a prior plea of guilty entered by the same defendant to the same indictment	5
(a) Cases in point	7
(b) Analogous cases	9
(c) Reason	11

AUTHORITIES CITED

Abrams v. *State*, 121 Ga. 170	11
Addington v. *Commonwealth*, 200 Ky. 290	11
Beason v. *State*, 43 Tex. Cr. App. 442	10
Bibb v. *State*, 83 Ala. 84	10
Carter v. *State*, 24 So. 307	10
City of Columbia v. *Jackson*, 227 S. W. 644	10
Commonwealth v. *Brown*, 150 Mass. 330	10
Commonwealth v. *Callahan*, 108 Mass. 421	11
Commonwealth v. *Ervine*, 8 Dana (Ky.) 30	8
Commonwealth v. *Hazeltine*, 108 Mass. 479	10
Ehrlick v. *Commonwealth*, 125 Ky. 742	10
Green v. *Florida*, 40 Fla. 474	7, 10
Heim v. *United States*, 47 App. D. C. 485; certiorari denied 247 U. S. 522	7
Heath v. *State*, 214 Pac. 1091	7
Kent v. *Porto Rico*, 207 U. S. 113	6
King v. *Burke*, 19 Can. Crim. Cases, 141	10
McCarty v. *Commonwealth*, 200 Ky. 287	11
McGuire v. *United States*, No. 85, Oct. Term, 1926, decided Jan. 3, 1927	7
Nuby v. *State*, 19 Ala. App. 424	11
Outz v. *State*, 29 Ga. App. 403	11
People v. *Boyd*, 67 Cal. App. 292	8
People v. *Gould*, 70 Mich. 240	11
People v. *Jacobs*, 165 App. Div. (N. Y.) 721	8
People v. *Ryan*, 82 Cal. 617	7
Rice v. *State*, 22 Tex. Cr. App. 654	10

	Page
State v. *Briggs*, 68 Iowa, 416	10
State v. *Bringgold*, 40 Wash. 12	10
State v. *Call*, 100 Me. 403	10
State v. *Carta*, 90 Conn. 79	8
State v. *Fairbrothers*, 99 N. J. L 225, 124 Atl. 452	10
State v. *Hand*, 71 N. J. L. 137	10
State v. *Hermanson*, 22 N. D. 125	10
State v. *Meyers*, 99 Mo. 107	7
United States v. *Alonso*, 8 P. I. 78	10
Wan v. *United States*, 266 U. S. 1	6
White v. *State*, 51 Ga. 285	7
Wilson v. *United States*, 162 U. S. 613	6
Judicial Code, sec. 240, as amended by the act of February 13, 1925, c. 229 (43 Stat. 936, 938)	1
Penal Code, sec. 215	2
Textbooks:	
Wigmore on Evidence (2d Ed.), Vol. II, sec. 1067	9
16 Corpus Juris, 631	9

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 705

ROBERT DAVID KERCHEVAL, OTHERWISE CALLED "Bob" Kercheval, otherwise called "Dave" Kercheval, petitioner

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals appears at page 70 of the record, and is reported in 12 F. (2d) 904.

JURISDICTION

The judgment of the Circuit Court of Appeals was rendered May 4, 1926. (R. 79.) The court denied a petition for rehearing on July 26, 1926 (R. 79). A petition for writ of certiorari under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, was filed October 26, 1926, and granted November 29, 1926. (R. 80.)

STATEMENT

Petitioner was indicted in the Western District of Arkansas, Texarkana Division, under Section 215 of the Penal Code, for using the mails to defraud. (R. 2–25.) To this indictment petitioner entered a plea of guilty (R. 30), and subsequently thereto was allowed to withdraw the plea of guilty and substitute a plea of not guilty (R. 33). He was then tried and convicted. (R. 25–27.)

At the trial, the United States Attorney stated in his opening to the jury that petitioner had once pleaded guilty (R. 29), and later introduced in evidence the said plea (R. 30). The only assignments of error before this Court relate to this statement by the District Attorney and to the introduction in evidence of the plea of guilty. (R. 28.)

By stipulation (R. 80) the evidence upon the merits has, in printing the transcript, been omitted from the bill of exceptions. The bill of exceptions, as printed, does, however, contain a great deal of evidence upon the question as to whether the plea of guilty had been voluntary. This question was opened by petitioner himself, who testified that the plea had been the result of an agreement with the Assistant District Attorney that he should receive a light sentence. (R. 32–39.) The Government then cross-examined the petitioner (R. 39–57) and produced the District Attorney (R. 57–62) and the Post-office Inspector (R. 63–67) as rebuttal witnesses, all to the effect that it had been necessary to return petitioner from New York to

the Western District of Arkansas under custody of a marshal, and that upon his return he had been informed by the District Attorney that no recommendation of a light sentence would be made to the court.

ASSIGNMENTS OF ERROR (R. 28)

Petitioner's assignments of error are two:

4

> The court erred in permitting Judge James D. Shaver, counsel for the Government, to state in his opening statement to the jury that defendant had entered his plea of guilty and then withdrawn it, and in refusing to reprimand counsel for making that remark in his opening statement.

17

> The court erred in permitting the plaintiff, over the objection of the defendant made at the time, to introduce and read in evidence the Exhibit No. 44, which is a formal plea of guilty by defendant on charges in this indictment.

If the plea is a proper item of evidence, necessarily the District Attorney must be entitled to refer to it in his opening statement. These assignments therefore present a single question for consideration by this Court—whether after a plea of guilty has been withdrawn by leave of court, that plea may be introduced in evidence by the Government in the subsequent trial upon the merits.

No assignment of error has been presented upon the question of the voluntary character of petitioner's plea, thereby recognizing that the question is one properly to be determined by the jury. The charge of the court upon the point was as follows (R. 69):

> The plea of guilty is introduced as evidence by the Government. You are to take that into consideration, that is, you will take it into consideration upon a certain condition. If you find that Mr. Kercheval made that plea of guilty and that no promise was held out to him for the purpose of getting him to make that plea, or if you find that he was notified before he made the plea that nothing that was ever said to him with reference to it theretofore would be met, then it is evidence for you to consider in connection with the other evidence in the case. If you find out however that he was included [sic], and you are to take all the facts and circumstances into consideration—you are to take Mr. Kercheval's intelligence into consideration in connection with whether or not he could be deceived in a matter of that kind, I say if you find that he was deceived; that this was brought about by conversations that he had had with reference to it, and that he made that plea of guilty when as a matter of fact he was not guilty, then you will disregard that particular part of it and consider just the other testimony in the case.

SUMMARY OF ARGUMENT

The authorities are practically evenly divided upon the express question here involved. It has, however, been universally held that a plea of guilty or a judicial confession, entered to the same or a similar charge in a different court of the same or a different jurisdiction, is admissible in evidence. That type of case can only be distinguished from the case at bar, in which the same court which allowed the withdrawal of the plea of guilty later admitted it in evidence, upon the theory that the court has in some way made a bargain with the accused. But the trial of a case is not the playing of a game, and while the defendant is entitled to a fair trial without the introduction of incompetent evidence to his prejudice, the use against him of admissions or confessions voluntarily made by himself does not make the trial unfair. Such admissions, whether made in court or *in pais*, are evidence for what they are worth, provided only that they have been voluntary.

ARGUMENT

IT WAS NOT ERROR TO ADMIT IN EVIDENCE A PRIOR PLEA OF GUILTY ENTERED BY THE SAME DEFENDANT TO THE SAME INDICTMENT

"When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evi-

dence they are satisfied it was not the voluntary act of the defendant." *Wilson* v. *United States,* 162 U. S. 613, 624; *Kent* v. *Porto Rico,* 207 U. S. 113, 118–119. Compare *Wan* v. *United States,* 266 U. S. 1, 16, in which "the undisputed facts showed that compulsion was applied." In the case at bar the voluntary character of the confession was in dispute and was properly submitted to the jury under the instruction of the court. (R. 69.)

Petitioner, however, draws a line between extra-judicial and judicial confessions, and, further, between judicial confessions or pleas before another or lower court and judicial confessions or pleas before the same court in which the trial is had. Extra-judicial confessions, and judicial confessions or pleas before another court, are concededly admissible as evidence. But, the argument runs, judicial pleas before the same court provide a unique exception to the universal rule of law and of human conduct that an adult is responsible for his voluntary acts or statements. When the court has of grace permitted such a plea to be withdrawn and the defendant to stand trial on the merits, some sort of estoppel is invoked against the court to prevent it from submitting to the jury with the other evidence of defendant's acts or admissions this evidence of defendant's admission, voluntarily made before itself. It is said that an Anglo-Saxon sense of justice is shocked by the idea that defendant does not start the race in court abreast of the Gov-

ernment. This may be true of a justice which still relies upon trial by battle or the ordeal.

But justice is no longer a game. See *McGuire* v. *United States,* No. 85, October Term, decided by this Court on January 3, 1927. It is a search for truth.

Turning to the authorities, we will consider, first, the cases in point and, then, the cases which appear to provide useful analogies.

(a) CASES IN POINT

In the Federal courts there appear to be only two cases applicable, one in the Court of Appeals of the District of Columbia in which the court divided, two justices holding against the Government and the Chief Justice dissenting (*Heim* v. *United States,* 47 App. D. C. 485; certiorari denied 247 U. S. 522), and the other being the case at bar, in which the court unanimously upheld the admission of the evidence.

In the State courts, the cases of *State* v. *Meyers,* 99 Mo. 107, 12 S. W. 516; *Heath* v. *State* (Crim. Ct. App. Okla.), 214 Pac. 1091; and *People* v. *Ryan,* 82 Cal. 617, 23 Pac. 121, hold the evidence inadmissible. In neither the *Meyers* nor *Ryan* opinions, however, are any cases cited. Dicta to the same effect are found in the Georgia case of *White* v. *State,* 51 Ga. 285, 289, and the Florida case of *Green* v. *State,* 40 Fla. 474, 24 So. 537.

It is important to remark that the *Ryan* case was expressly overruled in California in *People*

v. *Boyd,* 67 Cal. App. 292, 227 Pac. 783, 787. The *Boyd* case involved only an offer to plead guilty to one count, but the Supreme Court in denying a petition to have the cause heard in that court after affirmance in the District Court of Appeal expressly stated (p. 303) that the *Ryan* case "seems to be out of harmony with what we believe to be the correct and the better rule."

In addition to California, the rule in Connecticut, Kentucky, and New York is to the effect that a prior plea of guilty in the same proceeding is admissible upon the trial after the withdrawal of such plea. *State* v. *Carta,* 90 Conn. 79, 96 Atl. 411; *Commonwealth* v. *Ervine,* 8 Dana (Ky.) 30; *People* v. *Jacobs,* 165 App. Div. (N. Y.) 721.

In the Connecticut case of *State* v. *Carta,* both the majority and the minority of the court rendered carefully considered opinions. In the majority opinion the evidence is upheld, not as conclusive, but as "showing conduct on the part of the accused which was inconsistent with his claim of innocence before the jury," and it is pointed out that the plea in reality stands upon the same ground as a plea given in a lower, or magistrate's court, which is concededly admissible. The *Meyers* case in Missouri and the *Ryan* case in California are distinguished as cases in which the evidence was admitted as conclusive. The dissenting opinion, on the other hand, invokes "considerations of fairness" to the effect that "the withdrawal eradi-

cated" the plea. The *Carta* case and the *Heim* case present the most carefully considered opinions, and the same arguments and in general the same authorities are found in both. The two courts present an equal division of opinion.

It appears, therefore, that there is a remarkably even balance among the authorities, and that the case should turn upon the question as to what in reason is the better practice. The textbooks cited in the majority opinion in the *Heim* case, and in petitioner's brief, at p. 10, relied only upon the *Ryan* case, since overruled, and upon two or three other cases not in point. Their strength as authority is obliterated by reference to the later textbooks, which point out that the question is an open one upon which there is a conflict in the decisions. *Wigmore on Evidence* (2d Ed.) vol. II, sec. 1067, p. 551; 16 *Corpus Juris*, 631.

(b) ANALOGOUS CASES

The general rule is of course that extra-judicial confessions voluntarily given are admissable as evidence. A further development of that rule is that actual pleas of guilty entered to the same or similar charges in other courts are admissible. An examination of the authorities has disclosed to us no cases in which such judicial confessions have been excluded where they were voluntarily given, and the authority to the contrary is overwhelming.

Cases in which a plea of guilty before the committing magistrate has been held to be admissible upon a later trial on the merits in the higher court:

United States v. *Alonso,* 8 P. I. 78;

King v. *Burke,* Quebec (K. B.) 19 Can. Crim. Cases 141;

Bibb v. *State,* 83 Ala. 84, 3 So. 711;

Green v. *Florida,* 40 Fla. 474, 24 So. 537;

State v. *Briggs,* 68 Iowa 416, 27 N. W. 358;

Ehrlick v. *Commonwealth,* 125 Ky. 742, 102 S. W. 289;

State v. *Call,* 100 Me. 403, 61 Atl. 833;

Commonwealth v. *Brown,* 150 Mass. 330, 23 N. E. 49, and *Commonwealth* v. *Hazeltine,* 108 Mass. 479;

Carter v. *State* (Sup. Ct., Miss.), 24 So. 307;

State v. *Hand,* 71 N. J. L. 137, 58 Atl. 641, and *State* v. *Fairbrothers* (N. J.), 99 N. J. L. 295, 124 Atl. 452;

State v. *Hermanson,* 22 N. D. 125, 132 N. W. 415;

Rice v. *State,* 22 Tex. Cr. App. 654, 3 S. W. 791, and *Beason* v. *State,* 43 Tex. Cr. App. 442, 67 S. W. 96;

State v. *Bringgold,* 40 Wash. 12, 82 Pac. 132.

Case in which plea of guilty in a State court has been admitted as evidence on trial for the same offense under a city ordinance:

City of Columbia v. *Jackson* (Kansas City, Mo., Ct. App.) 227 S. W. 644.

Cases in which a plea of guilty in the Federal court has been admitted in a State prosecution for the same offense:

Nuby v. *State*, 19 Ala. App. 424, 97 So. 767;

Outz v. *State*, 29 Ga. App. 403, 116 S. E. 123;

McCarty v. *Commonwealth*, 200 Ky. 287, 254 S. W. 887, and *Addington* v. *Commonwealth*, 200 Ky. 290, 254 S. W. 889.

Cases in which an offer to plead guilty has been held properly admitted in evidence:

Abrams v. *State*, 121 Ga. 170, 48 S. E. 965;

Commonwealth v. *Callahan*, 108 Mass. 421;

People v. *Gould*, 70 Mich. 240, 38 N. W. 232.

(c) REASON

The universal policy of the law to admit voluntary judicial pleas of guilty as well as voluntary extra-judicial confessions is evident. The only ground of distinction between these cases and the case at bar would be on the assumption that the court in allowing the withdrawal of the plea of guilty has in some way made a bargain with the defendant that though, upon principle, the plea is relevant as evidence, nevertheless the court will not allow it to be used. Such a distinction appears to be a phase of the theory of justice which regards

the trial of a suit as the playing of a game. Its adoption would represent a step backward in the development of our criminal jurisprudence. The penalties for crime are no longer so severe as to lead the courts to invent technical arguments in the interest of so-called mercy. As pointed out by Chief Justice Smyth in his dissenting opinion in the District of Columbia Court of Appeals (47 App. D. C. at p. 497):

> Something is said about the humanity of the rule which opposes the admission of the plea, and inferentially the inhumanity of its converse. But if it is not inhuman to admit a confession of guilt before a magistrate, how does it become so to admit one made before a trial judge after greater time for thought by the defendant?
>
> In the case at bar the defendant objected to the admission of the plea because, as he alleged, it had not been voluntarily made. Thus the burden was thrown upon the Government to lay the proper foundation for its introduction, and the court in receiving it without such foundation erred; but the defendant extracted from this error all its vice by assuming the responsibility of showing that the plea was not voluntarily made, and then requesting the court to instruct the jury that, if they found it was not so made they should disregard it, which request was granted. We must assume that the jury, if they attached any value to the plea, decided that it was voluntary; hence the error committed in admitting it is not reversible.

The bar associations of the country, writers on juridical subjects, sociologists, and others who have given thought to the matter, complain of the great laxity which exists in the administration of our criminal law. They point out that one who can, through the skill of counsel, avail himself of all the opportunities the law affords for escape, may have little fear of punishment; that the course between an indictment and the final conviction, which may be made very long, has numerous byways for escape; and that as a result there is little respect for our criminal law in certain quarters.

However this may be, I am not willing, in the absence of legislation, and especially after Congress has indicated a contrary view (36 Stat. at L. 352, chap. 216, supra), to make more difficult the Government's work in attempting to bring to justice men charged with crime. Such men are undoubtedly entitled to a fair trial, but they are not deprived of such a trial by the court admitting in evidence against them their own voluntary statements.

The judgment should be affirmed.

WILLIAM D. MITCHELL,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant to the Attorney General.
WILLIAM D. WHITNEY,
Special Assistant to the Attorney General.
JANUARY, 1927.

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SUPREME COURT OF THE UNITED STATES.

No. 705.—October Term, 1926.

Robert Kercheval, Petitioner, *vs.* The United States of America. } On Writ of Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

[May 2, 1927.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner was indicted in the District Court for the Western District of Arkansas under § 215 of the Criminal Code for using the mails to defraud. He pleaded guilty, and thereupon the court sentenced him to the penitentiary for three years. Afterwards he filed a petition alleging that he was induced so to plead by the promise of one of the prosecuting attorneys to recommend to the court that he be punished by sentence of three months in jail and by fine of $1,000, and by the statement of such attorney that the court would impose that sentence. The petition asserted that the sentence given was excessive and prayed to have it set aside and the punishment alleged to have been promised substituted. The United States denied the allegations of the petition. After hearing evidence on the issue, the court declined so to change the sentence, but, on petitioner's motion, set aside the judgment and allowed him to withdraw his plea of guilty and to plead not guilty. At the trial the court, against objection by petitioner, permitted the prosecution as a part of its case in chief to put in evidence a certified copy of the plea of guilty. The petitioner in defense introduced the court's order setting aside the sentence and granting leave to withdraw that plea. Then both sides gave evidence as to matters considered by the court in setting aside the conviction. The court charged the jury: "The plea of guilty is introduced as evidence by the government. . . . If you find that Mr. Kercheval made that plea of guilty and that no promise was held out to him for the purpose of getting him to make that plea, or if you find that he was notified before he made

the plea that nothing that was ever said to him with reference to it theretofore would be met, then it is evidence for you to consider in connection with the other evidence in the case. If . . . you find that he was deceived, that this was brought about by conversations that he had had with reference to it, and that he made that plea of guilty when as a matter of fact he was not guilty, then you will disregard that particular part of it and consider just the other testimony in the case." The jury returned a verdict of guilty, and the court sentenced petitioner to the penitentiary for three years. The Circuit Court of Appeals affirmed the judgment. 12 F. (2d) 904. It said (p. 907): "In the motion made by defendant to set aside the judgment he admits that he had pleaded guilty. The purpose was to reduce the punishment, but if this failed he asked to withdraw his plea, and that the judgment be set aside. We know of no reason why the plea of guilty was not admissible under all these circumstances for what it might be worth. It was not conclusive of guilt, and the court so instructed the jury. The defendant probably knew better than any one else whether or not he was guilty. Under the evidence in this case a plea of guilty upon his part would have seemed a very reasonable thing. We see no substantial or prejudicial error in the admission of any of the evidence complained of." The case is here on certiorari. — U. S. —.

In support of the rulings below, the United States cites *Commonwealth* v. *Ervine*, 8 Dana (Ky.) 30; *People* v. *Jacobs*, 165 App. Div. 721; *State* v. *Carta*, 90 Conn. 79; *People* v. *Boyd*, 67 Cal. App. 292, 302; and *People* v. *Steinmetz*, 240 N. Y. 411. The arguments for admissibility to be gleaned from these cases are that the introduction of the withdrawn plea shows conduct inconsistent with the claim of innocence at the trial; that the plea is a statement of guilt having the same effect as if made out of court; that it is received on the principle which permits a confession of the accused in a lower court to be shown against him at his trial in the higher court; that it is not received as conclusive, and, like an extra-judicial confession, is not sufficient without other evidence of the *corpus delicti*. It is sometimes likened to prior testimony of the defendant making in favor of the prosecution.

Other decisions support the petitioner's contention that a plea of guilty withdrawn by leave of court is not admissible on the trial

of the issue arising on the substituted plea of not guilty. *Heim* v. *United States*, 47 App. D. C. 485; *State* v. *Meyers*, 99 Mo. 107, 119; *People* v. *Ryan*, 82 Cal. 617; *Heath* v. *State*, 214 Pac. (Okla.) 1091. And see *White* v. *State*, 51 Ga. 286, 290; *Green* v. *State*, 40 Fla. 474, 478. We think that contention is sound. A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. When one so pleads he may be held bound. *United States* v. *Bayaud*, 23 Fed. 721. But, on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence. *Commonwealth* v. *Crapo*, 212 Mass. 209. The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just. *Swang* v. *State*, 2 Coldw. (Tenn.) 212; *State* v. *Maresca*, 85 Conn. 509; *State* v. *Nicholas*, 46 Mont. 470, 472; *State* v. *Stephens*, 71 Mo. 535; *People* v. *McCrory*, 41 Cal. 458, 461; *State* v. *Coston*, 113 La. 717, 720; Bishop's New Criminal Procedure, § 747.

The effect of the court's order permitting the withdrawal was to adjudge that the plea of guilty be held for naught. Its subsequent use as evidence against petitioner was in direct conflict with that determination. When the plea was annulled it ceased to be evidence. By permitting it to be given weight the court reinstated it *pro tanto*. *Heim* v. *United States*, *supra*, 493. The conflict was not avoided by the court's charge. Giving to the withdrawn plea any weight is in principle quite as inconsistent with the prior order as it would be to hold the plea conclusive. Under the charge, if the plea was found not improperly obtained, the jury was required to give it weight unless petitioner was shown to be innocent. And, if admissible at all, such plea inevitably must be so considered. As a practical matter, it could not be received as evidence without putting petitioner in a dilemma utterly inconsistent with the determination of the court awarding him a trial. Its intro-

duction may have turned the scale against him. "The withdrawal of a plea of guilty is a poor privilege, if, notwithstanding its withdrawal, it may be used in evidence under the plea of not guilty". *White* v. *State, supra,* 290. It is beside the mark to say, as observed by the Circuit Court of Appeals, that petitioner knew better than any one whether or not he was guilty and that under the evidence a plea of guilty was a reasonable thing. These suggestions might bear upon the weight of admissible evidence but they have no relation to the admissibility of a withdrawn plea.

Courts frequently permit pleas of guilty to be withdrawn and pleas of not guilty to be substituted. We have cited all the decisions, state and federal, which have come to our attention, that pass on the question here presented. The small number indicates that in this country it has not been customary to use withdrawn pleas as evidence of guilt. Counsel have cited no case, and we have found none, in which the question has been considered in English courts.

We think the weight of reason is against the introduction in evidence of a plea of guilty withdrawn on order of court granting leave and permitting the substitution of a plea of not guilty.

Judgment reversed.

Mr. Justice STONE concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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